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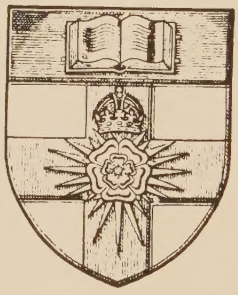

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1926.

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MEMORANDA.

1926.

Feb. 2. *The dignity of a Baron of the United Kingdom was conferred upon the* Right Hon. Sir Ernest Murray Pollock, Baronet, *Keeper or Master of the Rolls and Records of the Chancery of England, by the name, style and title of Baron Hanworth, of Hanworth, in the County of Middlesex.*

Feb. 18. *The dignity of a Viscount of the United Kingdom was conferred upon the* Right Hon. Andrew Graham, Baron Dunedin, G.C.V.O., *a Lord of Appeal in Ordinary, by the name, style and title of Viscount Dunedin, of Stenton, in the County of Perth.*

May 14. *The dignity of a Marquess of the United Kingdom was conferred upon the* Right Hon. Rufus Daniel, Earl of Reading, G.C.B., G.C.S.I., G.C.I.E., G.C.V.O., *sometime Lord Chief Justice, by the name, style and title of Marquess of Reading.*

June 4. The Right Hon. Sir John Edward Power Wallis, Knight, *formerly Chief Justice of the High Court of Madras, was appointed to be a Member of the Judicial Committee of the Privy Council in pursuance of Section* 2 *of the Appellate Jurisdiction Act,* 1908.

Aug. 21. The Right Hon. Satyendra Prasanna, Baron Sinha, K.C.S.I., *and the* Right Hon. Sir John Edward Power Wallis, Knight, *were appointed to be members of the Judicial Committee of the Privy Council under the provisions of Section* 1 *and Section* 30 *respectively of the Act* 3 *&* 4 *Will. IV. c.* 41.

Oct. 8. The Right Hon. Sir Thomas Rolls Warrington *resigned his office of a Lord Justice of Appeal and a Barony of the United Kingdom was conferred upon him on his retirement by the name, style and title of Baron Warrington of Clyffe, of Market Lavington, in the County of Wilts.*

Oct. 12. The Hon. Sir Paul Ogden Lawrence, *one of the Justices of His Majesty's High Court of Justice, Chancery Division, was appointed to be one of the Lords Justices of Appeal, in the place of the Right Hon. Sir Thomas Rolls Warrington, resigned.*

Oct. 12. Albert Charles Clauson, Esq., C.B.E., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, in the place of the Hon. Mr. Justice Lawrence, and afterwards received the honour of Knighthood.*

Nov. 5. The Hon. Sir Paul Ogden Lawrence *was sworn a member of His Majesty's Most Honourable Privy Council and took his place at the Board accordingly.*

Nov. 19. The Right Hon. Sir Lancelot Sanderson, Knight, K.C., *lately Chief Justice of the High Court of Judicature at Calcutta, was appointed to be a Member of the Judicial Committee of the Privy Council.*

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

RICKETTS . . . . . APPELLANT; H. L. (E.)*

AND 1925

COLQUHOUN . . . . . RESPONDENT. *Nov.* 9.

Revenue—Income Tax—Recorder—Emoluments of Office—Expenses "wholly, exclusively, and necessarily incurred and defrayed" in the Performance of Duties of Office—Travelling and Hotel Expenses—Deduction—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. E, r.* 9.

The Recorder of a provincial borough, who was a barrister residing and practising in London, claimed to deduct from the amount at which the emoluments of his office had been assessed for the purpose of income tax under Sch. E of the Income Tax Act, 1918, certain travelling expenses incurred by him in travelling from London to the borough and back, and certain hotel expenses incurred while in the borough:—

Held, that the travelling expenses were attributable to the exercise by the Recorder of his own volition in choosing to reside and practise

* *Present:* VISCOUNT CAVE L.C., LORD ATKINSON, LORD BUCKMASTER, LORD CARSON, and LORD BLANESBURGH.

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in London, and were not expenses which he was "necessarily obliged" to incur and defray in the performance of his duties, nor were any of the expenses money which he was "necessarily obliged" to expend "wholly, exclusively, and necessarily in the performance" of his duties, within the meaning of r. 9 of Sch. E; and that, therefore, he was not entitled to deduct the expenses in question from the amount of his assessment.

Decision of the Court of Appeal [1925] 1 K. B. 725 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Rowlatt J. (2)

The following statement of facts is taken from the opinion of the Lord Chancellor:—

"The appellant, a well known member of the Bar, who resides and practises in London, holds the office of Recorder of Portsmouth at a salary of 250*l.* a year; and in respect of the tax year 1923–24 he was assessed under Sch. E of the Income Tax Act at that amount. He appealed against this assessment to the General Commissioners for the Division of the Inner Temple, and, on the hearing of the appeal before those Commissioners, he gave evidence that it was necessary for him to travel to Portsmouth four times a year in order to hold his Court there, and he claimed to be entitled to deduct from his assessment certain expenses so incurred of which the following items are now material—namely, '(*a*) in respect of travelling expenses from London to Portsmouth and from Portsmouth to London, 8*l.* 5*s.*; (*b*) in respect of hotel expenses at Portsmouth, 5*l.*; (*c*) the sum of 10*s.*, being the amount of four payments of 2*s.* 6*d.* each made by the appellant in Portsmouth for carriage of his tin box to the Court,' these three items making together a total of 13*l.* 15*s.* It was admitted on behalf of the Crown that the deductions claimed were reasonable in amount, but it was contended that they were not of such a nature that the appellant was entitled to deduct them; and the Commissioners so held subject to a case which they stated for the opinion of the High Court. On the argument of the case Rowlatt J. confirmed the decision of the Commissioners, and an appeal from his judgment was dismissed by the Court of Appeal

(1) [1925] 1 K. B. 725. (2) [1924] 2 K. B. 347.

(Warrington L.J. dissenting), and it is from that decision that the present appeal is brought."

1925. Nov. 6, 9. *Macmillan K.C.* and *Konstam K.C.* (with them *William Allen*) for the appellant. The appeal raises a question as to the ambit of permissible deductions for income tax purposes under r. 9 of the rules applicable to Sch. E in respect of the office of Recorder. The Municipal Corporations Act, 1882, under which the appellant was appointed, requires that the person to be appointed Recorder shall be selected from a special class, which normally carries on business in London. He must be a barrister of five years' standing. It would be unfortunate if on accepting a recordership a barrister practising in London had to pay income tax on the expenses incurred by him in travelling to and from the place of his recordership and his living expenses while there detained, or else give up his practice, which he may legitimately continue to carry on. There are cases in which the expenses actually exceed the emoluments. The expenses must be necessarily incurred "in the performance" of his duty. The word "in" cannot be restricted to the time when the Recorder is sitting in Court. It is susceptible of being read "in relation to" the performance of his duties. The expenses referred to in r. 9 include any expenses reasonably incurred by the holder of an office to enable him to perform his duties. The appellant was under no obligation to reside at Portsmouth, and the expenses of travelling to and from Portsmouth and of being housed and fed while there were expenses necessarily incurred in the performance of his duties within the meaning of the rule.

Sir Douglas Hogg A.-G. and *Reginald Hills* for the respondent were not called upon.

VISCOUNT CAVE L.C. [after stating the facts]. My Lords, the rule which must govern the case is No. 9 of the rules applicable to Sch. E, which is in the following terms: "If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof

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the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."

As regards the appellant's travelling expenses to and from Portsmouth, with which may be linked the small payment for the carriage to the Court of the tin box containing his robes and wig, the material words of the rule are those which provide that, if the holder of an office is "necessarily obliged to incur . . . . the expenses of travelling in the performance of the duties of the office" the expenses so "necessarily incurred" may be deducted from the emoluments to be assessed. The question is whether the travelling expenses in question fall within that description. Having given the best consideration that I can to the question, I agree with the Commissioners and with the Courts below in holding that they do not. In order that they may be deductible under this rule from an assessment under Sch. E, they must be expenses which the holder of an office is necessarily obliged to incur—that is to say, obliged by the very fact that he holds the office and has to perform its duties—and they must be incurred in—that is, in the course of—the performance of those duties.

The expenses in question in this case do not appear to me to satisfy either test. They are incurred not because the appellant holds the office of Recorder of Portsmouth, but because, living and practising away from Portsmouth, he must travel to that place before he can begin to perform his duties as Recorder and, having concluded those duties, desires to return home. They are incurred, not in the course of performing his duties, but partly before he enters upon them, and partly after he has fulfilled them. No doubt the rule contemplates that the holder of an office may have to travel in the performance of his duties, and there are offices of which the duties have to be performed in several places

in succession, so that the holder of them must necessarily travel from one place to another. That was no doubt the case of the minister whose expenses were in question in the case of *Jardine* v. *Gillespie*. (1) But it rarely, if ever, happens that a Recorder is in that position, and there is no suggestion that any such necessity exists in the case of the present appellant. It is said that a barrister normally lives in London, or in some great city where there is a local Bar, and that the Legislature, in enacting in the Municipal Corporations Act that only a barrister shall be appointed Recorder, must have contemplated that he would usually incur some expenses in travelling to and from his Court. That may be so, but the question is, not what expenses a Recorder or the holder of some other office may be expected to incur, but what expenses he may deduct from his assessment, and upon this point r. 9 appears to be conclusive.

I may add that in the case of *Cook* v. *Knott* (2), decided in the year 1887, it was held by Pollock B. and Hawkins J., sitting as judges of the Queen's Bench Division, that travelling expenses of this character could not be deducted under a similar rule contained in s. 51 of the Income Tax Act, 1853. Since that decision the rule has been re-enacted in the same terms, and I should hesitate long before overruling a decision which has stood for thirty-eight years, and upon which subsequent legislation may have been based.

Passing now to the claim to deduct the hotel expenses at Portsmouth, this claim must depend upon the latter part of r. 9, which allows the deduction of money, other than travelling expenses, expended "wholly, exclusively and necessarily in the performance of the said duties." In considering the meaning of those words it is to be remembered that a decision in favour of the appellant would operate in favour, not only of Recorders, but of any holder of an office or employment of profit who is liable to be assessed under Sch. E, and would or might enable every holder of such a position to deduct his living expenses while away from his home. It seems to me that the words quoted, which are

(1) (1906) 5 Tax Cas. 263. (2) (1887) 2 Tax Cas. 246.

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confined to expenses incurred in the performance of the duties of the office, and are further limited in operation by the emphatic qualification that they must be wholly, exclusively and necessarily so incurred, do not cover such a claim. A man must eat and sleep somewhere, whether he has or has not been engaged in the administration of justice. Normally he performs those operations in his own home, and if he elects to live away from his work, so that he must find board and lodging away from home, that is by his own choice, and not by reason of any necessity arising out of his employment; nor does he, as a rule, eat or sleep in the course of performing his duties, but either before or after their performance.

I permit myself one further observation. Your Lordships may think it would not be unreasonable that a barrister, who accepts the honourable position of Recorder, often at a pecuniary loss to himself, should be credited in his assessment with the amount expended by him in going to and from the place of his employment, and possibly also—though as to this there may be more doubt—with his reasonable living expenses while he is detained there, or, in the alternative, that the responsible authorities should fix the salary attaching to the office at a sum sufficient to cover those expenses; but, however that may be, no such opinion can affect the present appeal. This House has only to construe the rule as it stands and, for the reasons which I have given, the rule does not avail the appellant.

It follows that in my opinion this appeal fails, and must be dismissed with costs, and I move your Lordships accordingly.

LORD ATKINSON. My Lords, I concur.

LORD BUCKMASTER. My Lords, I agree. The difficulty in arriving at a decision in this case is in my opinion entirely due to fixing attention on what is a fair and reasonable allowance for the expenses incidental to performing the duties of a Recorder, and not on what it is that the statute says may be

allowed for the purposes of the tax. The words of the statute are perfectly rigid, and in my judgment quite plain. They prohibit, by s. 209, any deductions excepting those that are expressly authorized, and r. 9 provides that the money to be deducted is only money that is expended wholly, exclusively, and necessarily in the performance of the duties. I cannot think that any of the items in dispute, which are no doubt typical items, affecting not merely this case but others as well, can come within the meaning of that phrase. I therefore agree that this appeal should be dismissed with costs.

LORD CARSON. My Lords, I agree.

LORD BLANESBURGH. My Lords, I am of the same opinion. This r. 9 deals with the permissibly deductible expenses of offices so diverse in character that the performance of their different duties calls for every form of activity and repose. To particularize quite at random, the rule is concerned with the expenses of, amongst a multitude of other persons, Admirals, Generals, Officers of the Air Force, Clerks in the Treasury, Surveyors of Highways, and Recorders, and in its language it makes no discrimination between them. Undoubtedly its most striking characteristic is its jealously restricted phraseology, some of it repeated to heighten the effect. But I am also struck by this, that, as it seems to me, although undoubtedly less obtrusively, the language of the rule points to the expenses with which it is concerned being only those which each and every occupant of the particular office is necessarily obliged to incur in the performance of its duties—to expenses imposed upon each holder *ex necessitate* of his office, and to such expenses only. It says: "If the holder of an office"—the words, be it observed, are not "If any holder of an office"—"is obliged to incur expenses in the performance of the duties of the office"—the duties again are not the duties of his office. In other words, the terms employed are strictly, and, I cannot doubt, purposely, not personal but objective: the deductible expenses do not extend to those which the holder has to incur mainly and, it

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may be, only because of circumstances in relation to his office which are personal to himself or are the result of his own volition. This I think is the conclusion of the Master of the Rolls and Scrutton L.J., and it is only because Warrington L.J. takes a different view of the rule in this particular aspect of it that he has reached a conclusion differing from that of his learned colleagues. "The words 'necessarily' and 'necessary' in the rule," he says, "do not mean necessary or necessarily in the abstract, but they mean necessary in regard to the circumstances of the individual concerned, the holder of the office, and in regard to the ordinary usages of mankind at this time in the history of the world." With great respect to the Lord Justice I cannot myself so read the rule, and, read as I think it must be, a conclusion differing from his is, I think, reached almost of course.

The travelling expenses of the appellant from London to Portsmouth and back are, in my judgment, excluded from the benefit of the rule, both by the application of the test I have indicated as relevant and also for another reason quite separate. The expenses covered by the words "the expenses of travelling in the performance of the duties of the office" are, I think, limited to those which the Master of the Rolls has well termed "itinerant expenses." There are none such here, and the limitation so put by the rule upon travelling expenses makes it difficult as matter of construction to bring other expenses of travelling under the general words in the later part of the rule. I will, however, assume that the appellant can overcome this difficulty. Even so, these general words are not, as I think, apt to include the travelling expenses now in question. That the appellant travelled from London to hold his Court at Portsmouth and returned to London at the close of the sessions was, in my judgment, a course prescribed for him by his own convenience as a practising London barrister and by nothing else. But his position and activities as such had nothing to do with the performance of his duties as Recorder of Portsmouth. Although he might not have been chosen, he would have been eligible for that

office if he had never so practised, and if he was not at the time of his appointment so practising. More relevant still, he was, I apprehend, under no obligation express or implied—or even conventional—to continue so to practise while holding his office. Accordingly, it seems to me, expenses incurred by him in going from and returning to his London professional chambers cannot in any true sense be described as money expended "wholly, exclusively, and necessarily" in the performance of his judicial duties. Rather are they expenses incurred by him because, for his own purposes, he chose to live in London; in other words they are purely personal to himself.

The expense of carrying the appellant's tin box from the station at Portsmouth to the Court, which is merely illustrative, and of which, of course, little was said, falls, I think, with the Recorder's personal claim. If the appellant is not to be allowed as a deduction the expense incurred in himself reaching the Court where he must needs be in order to discharge his judicial functions at all, he cannot be permitted the carriage of his tin box, which has only to be brought to the Court that he may discharge those functions with more appropriate circumstance.

Nor of the appellant's hotel expenses at Portsmouth can it, in my judgment, be said that they were incurred "wholly, exclusively, and necessarily in the performance" of the duties of the office of Recorder of Portsmouth. So far as these expenses are charges for food or refreshment—if they may in any way be severed—they are clearly, I think, inadmissible. The cost of the appellant's breakfast, lunch or dinner cannot be wholly, exclusively, and necessarily attributable to the performance of the duties of the office of Recorder merely because these meals were taken at Portsmouth and not elsewhere. And, so far as this item of charge represents a charge for the Recorder's room at the Portsmouth hotel—and I am willing to treat it as being exclusively so—the same conclusion, if less clearly, follows. I cannot myself see why the appropriate expenditure by a Recorder living at Portsmouth in his own home during sessions is not

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as much wholly, exclusively, and necessarily expended in the performance of his duties as is the cost of the appellant's room at a hotel. The truth is that these expenses cannot in either case be properly so described; they are personal in each case to the Recorder—expenses to be defrayed out of his stipend, but in no way essential to be incurred that he may earn it.

For the reasons given by the Lord Chancellor, I regret this decision of your Lordships, but, as the law stands, I think it is inevitable.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Nov. 9, 1925.

Solicitors for the appellant: *Clowes, Hickley & Heaver.*
Solicitor for the respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (E.)* 1925 Oct. 23.

LORD LECONFIELD AND ANOTHER . . APPELLANTS;

AND

THORNELY . . . . . RESPONDENT.

Local Government—Clerk of the Peace of a County—Clerk appointed after 1888—Condition determining Appointment on Notice—Notice of Dismissal—Tenure of Office—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *ss.* 83, 118.

The Local Government Act, 1888, has not changed the tenure of the office of clerk of the peace of a county from a tenure during good behaviour to a tenure at pleasure.

Where, therefore, after the passing of the Act (which provides that the clerk of the peace of a county shall also be the clerk of the county council), a person is appointed clerk of the peace of a county and of the county council, subject to a condition providing for the termination of the appointment on notice, he cannot be removed from his

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* *Present:* LORD BUCKMASTER, LORD ATKINSON LORD SUMNER, LORD WRENBURY, and LORD DARLING.

office save for misbehaviour, and a notice of dismissal in the terms of the condition is ineffective to determine his tenure of the office. The appointment is good though the condition is bad.

Decision of the Court of Appeal [1925] 1 K. B. 236 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Swift J.

On November 14, 1913, the standing joint committee of the administrative county of West Sussex appointed the respondent clerk of the peace and of the county council for the said administrative county, subject to certain conditions, one of which was that six months' notice on either side should be given to determine the appointment.

On May 23, 1924, the standing joint committee gave the respondent notice in writing in accordance with the terms of his appointment determining his appointment on December 26, 1924.

The appellants were the chairman and another member of the joint committee.

On May 29, 1924, the respondent commenced an action against the appellants (sued on behalf of themselves and all other members of the standing joint committee) for a declaration that the respondent's tenure of his office of clerk of the peace was a freehold tenure and that he could not be removed therefrom save for misdemeanour charged and proved in accordance with the statutes in that behalf made and provided.

The question of the validity of the notice of dismissal turned primarily upon the construction of s. 83 of the Local Government Act, 1888. (2)

(1) [1925] 1 K. B. 236.

(2) Local Government Act, 1888, s. 83:—

"Subject to the provisions of this Act for the protection of clerks of the peace holding office at the passing of this Act, the following provisions shall have effect:—

(1.) The clerk of the peace of a county, besides acting as clerk of the peace of that county, shall also (subject to the provisions of this Act as respects particular counties) be the clerk of the County Council, and in that capacity is referred to in this Act as the clerk of the County Council.

(2.) He shall be from time to time appointed by the standing joint committee of the county council and the quarter sessions, and may be removed by that joint committee.

(3.) He shall, subject to the directions of the custos rotulorum or the quarter sessions or the county council, as the case may require, have charge

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Swift J. held that the effect of the section was to create a new officer appointed in a different way and liable to be removed from his office by a different body and in a different way from that which appertained to the old office of clerk of the peace. He accordingly held that the action failed and that the notice to determine the appointment was good.

The Court of Appeal (Bankes, Atkin and Sargant L.JJ.) reversed the decision of the learned judge and gave judgment in favour of the respondent.

1925. July 10, 13. *Sir John Simon K.C.* (with him *John Flowers*) for the appellants. A clerk of the peace of a county and of the county council appointed under s. 83 of the Local Government Act, 1888, does not enjoy an office which is to be held for life during his good behaviour in the same manner as a clerk of the peace appointed before the passing of the Act. Sect. 83 has created a new and composite office and has transferred the powers of appointment and dismissal formerly vested in the custos rotulorum and the quarter sessions respectively to a different body—namely, the standing joint committee of the quarter sessions and the county council. This involves that the appointment and dismissal are within the discretion of the joint committee, and it follows that the appointment of this new officer can be made upon terms which provide for the termination of his tenure of office. A clerk of the peace was formerly appointed by the custos rotulorum, and by 37 Hen. 8, c. 1, it was provided that the office, which was originally held for life, should be held during the life of the custos rotulorum. But

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of and be responsible for the records and documents of the county."

[Sub-s. 4 provides for the appointment of a deputy clerk by the joint committee to hold office during their pleasure.]

Sect. 118:—

"(1.) A person holding office at the appointed day as clerk of the peace of a county, besides continuing to be such clerk of the peace shall, subject to the provisions respecting certain counties in this Act mentioned, become the clerk of the county council, and if appointed before the passing of this Act, shall, notwithstanding anything in this Act, hold his offices by the same tenure and have the same power of appointing and acting by a deputy as heretofore in his capacity of clerk of the peace."

by 1 Wm. & Mary c. 21, it was provided by s. 5 that the office of clerk of the peace should be held for life so long as he should well demean himself in his office, and by s. 6 that, in case he should misdemean himself in the execution of his office, he could be discharged by quarter sessions after a judicial inquiry. By the Clerks of the Peace Removal Act, 1864, a clerk of the peace could be removed by quarter sessions for misconduct otherwise than in the execution of his office. The latter Act has now been repealed by the Statute Law Revision (No. 2) Act, 1893, except as to any clerk of the peace appointed before the passing of the Local Government Act, 1888. This shows that, in the case of a clerk of the peace and of the county council appointed under the Act of 1888, the Legislature took the view that the question of his dismissal was completely provided for by s. 83, and strongly confirms the appellants' construction of that section. Sect. 83 is expressed to take effect subject to the provisions of the Act for the protection of clerks of the peace holding office at the passing of the Act, and as to any such clerk of the peace s. 118 provides that he shall become the clerk of the county council and shall, notwithstanding anything in the Act, hold his offices by the same tenure as theretofore in his capacity of clerk of the peace, the inference being that a clerk of the peace and of the county council appointed under the Act holds by a different tenure. The statute 1 Wm. & Mary c. 21 has not been expressly repealed, but so far as its provisions are inconsistent with the provisions of the Act of 1888 they must be taken to be impliedly repealed by s. 126 of that Act. Sect. 6 provides that a clerk of the peace cannot be discharged for misconduct in the execution of his office without a judicial inquiry in open court, but by s. 78 of the Act of 1888 it is expressly provided that the standing joint committee have no power to administer an oath or to perform any judicial business or otherwise act as justices of the peace. Therefore the committee cannot carry into effect the provisions of s. 6, and it follows that that section cannot have been intended to operate in the case of a clerk of the peace appointed under the Act of 1888. Further, the

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respondent cannot be heard to say that he holds the office on the terms that he can disregard a notice of dismissal given in accordance with the conditions under which he was appointed. He is asking for a declaration that, though he accepted the office on some terms, he holds it on other terms. Assuming that the condition providing for the termination of the appointment is bad, the appointment itself is bad: *The King and Queen* v. *Owen*. (1)

J. B. Matthews K.C. and *Cecil Lilley* (with them *Herle Nicholson*) for the respondent. As to the repeal of the Clerks of the Peace Removal Act, 1864, that Act applied not only to county clerks, but to borough clerks, with which the Local Government Act of 1888 has no concern. Therefore the repeal cannot be explained on the ground stated by the appellants. Whatever may have been the reasons for the repeal of that Act by the Statute Law Revision Act of 1893 that repeal has not affected the principles theretofore existing; it has not essentially altered the position of clerks of the peace and has not absolved a clerk of the peace, whether borough or county, from liability to removal for misconduct, either within or outside the office: *Leeds Industrial Co-operative Society* v. *Slack*. (2) Moreover, the construction of the Act of 1888 cannot be affected by a repeal enacted in 1893. The duties of a clerk of the peace are inconsistent with his having the status of a servant removable at will, and require that he should have an independent position. As clerk of the peace at quarter sessions he keeps the minutes and draws up the orders of the court after the dispersal of the justices. He is essential to the existence and functions of quarter sessions. He has also special duties imposed upon him by several Acts of Parliament, e.g., Waterworks Clauses Act, 1847, ss. 7, 9, 20, 21, 83; Cemeteries Clauses Act, 1847, s. 66; Harbours, Docks and Piers Clauses Act, 1847, s. 97; Markets and Fairs Clauses Act, 1847, ss. 7, 8. His salary, though payable out of the county fund, must be approved by the Secretary of State. In view of the fact that the statute 1 Wm. & Mary c. 21 is still on the books, why is a clerk of the

(1) (1694) 4 Mod. 293. (2) [1924] A. C. 851, 861.

peace not to enjoy his old tenure ? The Act of 1888 transferred to a new body the administrative functions of quarter sessions, and it was therefore enacted that the clerk of the peace should also become clerk of the county council, but it is still one office at one salary. The fact that other duties are superadded is no reason for depriving this old and honourable office of its former dignities. A clerk of the peace is an officer and not a servant. The moment the appointment is made the law estates him in his office. He is nobody's servant except the servant of the law : *Harding* v. *Pollock* (1) ; Dickinson's Quarter Sessions, 6th ed., pp. 104, 105. Before 1888 the custos rotulorum could not attach any conditions to the office of clerk of the peace, and the removal from that office could only be in accordance with statutory procedure : *Harcourt* v. *Fox*. (2) Then what are the words in the Act of 1888 which are apt to effect the momentous change contended for by the appellants ? The Act says that the clerk of the peace shall be from time to time appointed by the standing joint committee and may be removed by that committee, but it assigns no new causes of removal. The committee, in appointing a clerk of the peace, has no power to impose conditions on the appointment or to alter the status or tenure of the office. Where the Act intends that an officer shall hold his office at the pleasure of the committee it says so in plain terms. Thus the same section which provides for the appointment of the clerk of the peace also provides for the appointment by the joint committee of a deputy clerk (who formerly held office during good behaviour) " to hold office during their pleasure." Further, by the Municipal Corporations Act, 1882, s. 164, it is expressly provided that a clerk of the peace for a borough shall hold office during good behaviour. In view of that provision it is inconceivable that the Legislature could have intended that a clerk of the peace of a county should hold his office by any inferior tenure. The point that if the condition is bad the appointment is bad also was not raised by the pleadings and was not taken at

(1) (1829) 3 Bli. N. S. 161, 183.
(2) (1692) 1 Show. 426, 428; 506, 513, 523, 534, 535.

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the trial, and it is not open to the appellants. In *The King and Queen* v. *Owen* (1) the appointment was expressed to be during pleasure. Here the appointment itself is good, but the condition annexed to the appointment is bad, and is easily severable.

[They also referred to *Osgood* v. *Nelson* (2); *Reg.* v. *Hayward* (3); *Liverpool Corporation* v. *Wright* (4); *Garnett* v. *Bradley* (5); *Baddeley* v. *Earl Granville* (6); *Amalgamated Society of Railway Servants* v. *Osborne* (7); *London County Council* v. *Attorney-General.* (8)]

John Flowers replied.

The House took time for consideration.

1925. Oct. 23. LORD BUCKMASTER. My Lords, the issue on this appeal is accurately stated in para. 2 of the appellants' case in the following terms: "The main question is briefly whether a clerk of the peace and of a county council appointed since the passing of the Local Government Act, 1888 (51 & 52 Vict. c. 41), holds or can claim that he holds an office for life terminable only on misbehaviour, notwithstanding that by the terms of his appointment his office was terminable on notice."

The matter is one of considerable importance, as it affects the office, not only of the present respondent, but of all persons who are clerks of the peace and of the county council appointed since 1888. The office of clerk of the peace is one of great antiquity. Until the passing of the Local Government Act of 1888, the appointment had always been in the hands of the custos rotulorum. Before 37 Hen. 8, c. 1, the office was for life; but by this Act it was limited to the duration of the office of the custos rotulorum, provided that the clerk "demean him in the said office justly and honestly." So the law remained until the first year of William and Mary, when the statute 1 Wm. & Mary, c. 21, re-established the

(1) 4 Mod. 293.
(2) (1869) 10 B. & S. 119.
(3) (1862) 2 B. & S. 585.
(4) (1859) John. 359.
(5) (1878) 3 App. Cas. 944, 965.
(6) (1887) 19 Q. B. D. 423, 426-7.
(7) [1910] A. C. 87, 94, 97.
(8) [1902] A. C. 165.

provision that the office should be for life (s. V.), and added a special clause regulating the only method by which it was possible to establish against the clerk that he had not demeaned himself justly and honestly in his office. That section was in the following words: "Section VI. And bee it enacted by the authoritie aforesaid That if any clerke of the peace already nominated or to be nominated as aforesaid shall misdemeane himselfe in the execution of the said office and thereupon a complaint and charge in writeing of such misdemeanour shall be exhibited against him to the justices of the peace in their generall quarter sessions it shall be lawfull for the said justices or the major part of them from time to time upon examination and due proofe thereof openly in their said generall quarter sessions to suspend or discharge him from the said office."

It is as well to notice the protection which this statute conferred upon the clerk. The complaint on which he could be removed was in the nature of an information: *Reg.* v. *Baynes* (1); the charge was tried openly in general quarter sessions, and the removal had to be a matter of record in the court: *Reg.* v. *Russell.* (2) It will be noticed that, in the definition of the causes for which a clerk of the peace might be dismissed, no mention is made of any offence beyond those committed in the discharge of his office. This was remedied by the Clerks of the Peace Removal Act of 1864, which provided that if it appeared to two justices of the county that the clerk had been guilty of such misconduct otherwise than in the execution of his office as in their opinion rendered him unfit to be clerk of the peace, they might exhibit against him to the court of general or quarter sessions a complaint, and on trial in open court if the complaint was proved he could be suspended or removed. There was also power reserved for the clerk to appeal by motion to the Lord Chancellor to reverse, confirm or modify the decision.

Apart from the protection afforded by the statutes, it is plain that the position of clerk of the peace has always been acknowledged as that of a man holding an office, and the

(1) (1705) 2 Salk. 680. (2) (1869) 10 B. & S. 91.

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duties that he discharged were duties that he owed to the public and not to the "custos rotulorum" by whom he was appointed: *Harcourt* v. *Fox*. (1) The Act of 1888 has made certain changes in connection with the office. Sect. 83 enacted that the clerk of the peace of a county should also be the clerk of the county council and that he should be "from time to time appointed by the standing joint committee of the county council and may be removed by that joint committee." The joint committee for this purpose is by s. 20 a body constituted of an equal number of justices for the county and members of the county council. Sect. 118 preserved the rights of existing officers in the following terms: "Existing Officers. (1.) A person holding office at the appointed day as clerk of the peace of a county, besides continuing to be such clerk of the peace shall, subject to the provisions respecting certain counties in this Act mentioned, become the clerk of the county council, and if appointed before the passing of this Act, shall, notwithstanding anything in this Act, hold his offices by the same tenure and have the same power of appointing and acting by deputy as heretofore in his capacity of clerk of the peace."

In purported exercise of the powers conferred by s. 83 the standing joint committee for the county of West Sussex, on November 14, 1913, passed a resolution appointing the respondent clerk of the peace and of the county council at a salary of 2000*l*., to commence on December 26, 1913, subject to certain conditions. There then followed ten special conditions, No. 3 of which was as follows: "Six months' notice shall be given on either side to determine the appointment." On May 23, 1924, the committee resolved that six months' notice should be given to respondent, determining his appointment on December 26, 1924. The respondent thereupon took proceedings to obtain a declaration that this action was beyond their powers. Swift J., however, held that the office was ended. The Court of Appeal reversed that decision, and from their judgment the county council has appealed to this House.

(1) 1 Show. 506.

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I am clearly of opinion that the appeal should fail. There are two main arguments urged in its support, the first that the power of appointment and removal conferred by s. 83 is a general power such as would be applicable in the case of a servant, and it is suggested that this construction is enforced by the reference at the beginning of the section to the provisions for protecting clerks who were holding office at the date of the passing of the Act. If it be once remembered that, as already pointed out, the position of a clerk of the peace was the holder of an office and that this position had not been changed by the Act, this argument must fail. The Act says no more and does no more than to provide that the power of appointment previously possessed by the custos rotulorum should thenceforth be exercised by the joint committee, who should also enjoy the power of removal previously held by quarter sessions. No modification beyond this was ever created in the tenure of the office and no new cause of removal imposed by the statute. The argument based upon s. 118, to the effect that as this provides that existing clerks should, notwithstanding anything in the Act, hold office by the same tenure as before, it means that the tenure is changed, and that the tenure involves the period for which the office was held, is not to my mind sustainable. Tenure includes all the incidents of the office, one of which was the very special power of removal which was modified in the manner mentioned. Clerks existing at the time of the passage of the statute of 1888 are entitled to claim that no steps can be taken for their removal without the formalities imposed by the statutes of 1 Wm. & Mary and the Act of 1864. This is a valuable privilege and is expressly reserved. It was also contended that the power of the joint committee as to removal must be general, since the special method of removal previously in force could not apply, as they had no power to administer oaths and no right to hold a court. It is not necessary that they should do so. They must, however, proceed with due regard to the formalities of justice and the decision they reach must be judicial in its character. It was then suggested that the power of removal must be

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construed by considering what would be applicable to the clerk of the council, but the truth is there is no such independent person, and the office of the clerk of the peace cannot be diminished and shorn of its proper dignity because there have been added to it duties which if performed alone might have been discharged by a person whose tenure was less secure. Finally, it is said that the Statute Law Revision Act of 1893 has repealed the Act of 1864, and that this could only have been done upon the assumption that the powers given by that Act were all merged in the wider powers conferred by the Act of 1888. I am not prepared to assent to the proposition that an Act of Parliament can be construed by considering the terms of a later statute, and more particularly where that statute is merely one of statute law revision. It is indeed suggested that the repeal is of no effect, but neither can I accept this view. I think there has been a mistake which it would be well to remedy, but I decline to rectify that mistake by changing the whole tenure of an office such as that of clerk of the peace. It may also be observed that if the appellants' argument were right, then, owing to the fact that the Municipal Corporations Act, 1882, expressly prevents the clerk to the borough magistrates holding for any less tenure than his life, the clerk to the county magistrates would hold an inferior office determinable at will.

The fundamental underlying fallacy of the appellants' case lies in the view that the joint committee contracted for the service of an officer instead of merely exercising the powers of appointment to an office. The respondent was not engaged as their servant; he was as clerk of the peace in the service of no one except the Crown, and were the appellants' contention right, were he unjustly dismissed, there would have been no person or body against whom he could have claimed damages.

It was also argued that if the appellants' main contention was unsound, the power of appointment had never been properly exercised, and the respondent did not hold and never had held the office. In support of this view the case of

Rex et Reg. v. *Owen* (1) was relied on. But that case is distinct from the present one. There the appointment was in terms during pleasure and was consequently bad, as there was no appointment that could be so made.

Here the actual appointment is perfectly good, but there is superadded a bad though easily severable condition which is void.

For these reasons I think this appeal should fail.

LORD ATKINSON. My Lords, the standing joint committee of the administrative county of West Sussex passed, on November 14, 1913, a resolution to the effect that Mr. Samuel Thornely, the respondent in this appeal, be and thereby was appointed clerk of the peace and of the county council of West Sussex at a salary of 2000*l.* per annum, 1000*l.* of which was for his own personal emolument, and the remainder for his staff to include all business which by reason of his office he might be called upon to perform, and to include amongst other things the duties of clerk to the standing joint committee, and of the other committees of quarter sessions or county council except committees the clerkship of which was otherwise provided for.

One of the terms upon which this appointment was made was that six months' notice should be given on either side to determine it. On April 29, 1924, the same joint committee passed a resolution expressing their opinion that the respondent could no longer continue to act as clerk of the county council and that he should be invited to resign this office and also that of clerk of the peace within fourteen days, and failing so to do, that notice should be given to determine his appointment. The respondent claimed that his office was a freehold office and declined to resign, he also protested that the committee had no jurisdiction to determine it. On May 23, 1924, the same standing joint committee passed a resolution, referring to the previous resolution of April 29, 1924, and purporting to determine the respondent's office of clerk of the peace and also of the county council of the administrative

(1) 4 Mod. 293.

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county of West Sussex from December 26, 1924. On May 29, 1924, the respondent instituted the action against the appellants out of which this appeal has arisen, claiming a declaration to the effect that the office he held was a freehold office, and that the resolution and notice above referred to, purporting to determine it, were ineffective for that purpose.

The question for decision turns mainly no doubt upon the construction of ss. 83 and 118 of the Local Government Act of 1888, but in order to solve that question it is essential to keep in mind what was the true nature of the office of clerk of the peace and what its legislative history. The office of clerk of the peace is a very ancient one. The mode of appointment to it, the conduct of the holder of it while in it, the discharge of the duties belonging to it, and the method by which the holder can be removed from it have, for many centuries, been treated as matters of such public interest that they have been dealt with by legislative enactments.

The appellants do not dispute that under this body of legislation, and up to the passing of the Local Government Act of 1888 (51 & 52 Vict. c. 41), the office of clerk of the peace was held to be, and was, an office for life terminable against the will of the holder only on the ground of misbehaviour. But they contend that this latter statute has so altered the nature of the office and the rights belonging to it that the standing joint committee had jurisdiction and power to dismiss him from his office—remove him from it, as the operation was formerly styled—no matter how well conducted and efficient he might be, simply on giving him six months' notice. In order to determine whether the provisions of the Act of 1888 are clear, direct and explicit enough to effect this revolution, one must refer to the early legislation to appreciate what was this official's position before the latter date.

The provisions of 37 Hen. 8, c. 1, and of 1 Wm. & Mary, c. 21, dealing with the office, have been quoted already by my noble and learned friend who has preceded me. It is unnecessary to repeat them.

The complaint to the justices under the statute of William and

Mary was in the nature of an information: *Reg.* v. *Baynes* (1); the order for removal was in the nature of an order as distinguished from a conviction: *Rex* v. *Lloyd* (2); and was required to be made a record of the Court which pronounced it: *Reg.* v. *Russell.* (3) These two statutes I have just referred to left untouched, however, the case of a clerk of the peace, who, though guilty of misconduct which showed he was unfit to hold the office, was not guilty of misconduct in the execution of that office. To deal with this defect, the Clerks of the Peace Removal Act, 1864 (27 & 28 Vict. c. 65), was passed.

It provided that if it appeared to two justices of the peace of a county that the clerk of the peace of the county had, after the passing of the Act, been guilty of such misconduct otherwise than in the execution of his office as in the opinion of these justices rendered him an unfit or improper person to hold the office of clerk of the peace, they might exhibit against him in the court of quarter sessions of the county a complaint in writing stating the misconduct of which he had been guilty, a copy of which complaint had to be sent to the custos rotulorum, and the court, if satisfied upon due examination in open court that the clerk complained of had been guilty of the misconduct attributed to him, and that the same rendered him an unfit or improper person to hold his office, might suspend or remove him from his office, a new clerk of the peace being appointed in manner provided by the said Act (i.e., 1 Wm. & Mary, c. 21) in cases where the clerk of the peace had misdemeaned himself in the execution of his office.

By s. 3 a right of appeal to the Lord Chancellor is given to the clerk of the peace so removed.

There could scarcely be anything more unlike, in spirit and method, the arbitrary proceedings by which the appellants sought to dismiss their clerk of the peace in this case, without alleging any cause, than the formal just and considerate legal proceeding prescribed by the statutes of 1688 and 1864 for a like purpose. The latter statute is expressly repealed by the

(1) 2 Salk. 680. (2) (1734) 2 Str. 996.
(3) 10 B. & S. 91.

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Statute Law Revision (No. 2) Act, 1893 (56 & 57 Vict. c. 54, s. 1 and first Schedule), except as to any clerk of the peace appointed before 1888. The Legislature have not relied apparently on the Local Government Act of 1888 impliedly repealing the Act of 1864. They have expressly repealed it in the interest of the clerk of the peace who may be guilty of misconduct which might unfit him for that office but was committed otherwise than in execution of that office.

It is difficult to see upon what ground the Act of 1688 is left unrepealed expressly, unless it be that s. 83 of the Act of 1888 impliedly repeals it. It is clear that the standing joint committee cannot adopt precisely the procedure prescribed by the Act of 1 Wm. & Mary if they aim at dismissing a clerk of the peace, for by s. 78 of the Act of 1888 the members of this committee are deprived of the power to exercise the powers of a court of record, or to administer an oath, or to exercise any jurisdiction under the Summary Jurisdiction Act, or perform any judicial business, or otherwise act as justices of the peace; but that fact by no means establishes that the committee can dismiss this officer from his office arbitrarily, without adequate cause established.

Sect. 30 of the Act of 1888 provides for the appointment of the joint committee of quarter sessions and the county council, consisting of such equal number of justices appointed by quarter sessions and of members of the council appointed by the council as may be arranged between the two bodies. Any matters arising under the Act with respect to the police or to the clerk of the peace, or clerks of the justices, or to officers who serve both the quarter sessions or the justices, or generally any other matter requiring to be determined jointly by the quarter sessions and county council, are to be referred to and determined by the joint committee under this section.

By s. 81 any county council or councils or any court or courts of quarter sessions are empowered from time to time to join in appointing a joint committee out of their respective bodies, for any purpose in which they are jointly interested, and any council or court taking part in the appointment of such a committee under the section may, from time to time

delegate to the committee any power which such council or court might exercise for the purpose for which the committee was appointed, and subject to the terms of the delegation, any such joint committee shall in respect of the matter delegated to it have the same powers in all respects as the councils or courts appointing it, or any of them, as the case may be.

Sect. 83 of this same statute provides that, subject to the provisions the Act contains for the protection of clerks of the peace holding office at the passing of the Act, the following provisions are to have effect. The clerk of the peace of a county besides acting as clerk of the peace of that county shall also, subject to the provisions of the Act as respect particular counties, be the clerk of the county council, and in that capacity is referred to in the Act as clerk of the county council. He shall be from time to time appointed by the joint committee of the county council and quarter sessions and may be removed by that joint committee. He is, subject to the directions of the custos rotulorum, of the quarter sessions, or of the county council, as the case may require, to have charge of and be responsible for the records and documents of the county. The joint committee are empowered to appoint a deputy clerk to hold office during their pleasure and to act in lieu of the clerk on the occasions and for the purposes named.

It will be observed that it is the statute itself, not any contract made under it, which imposes on the clerk of the peace the obligation to become the clerk of the county council, not of the joint committee. There is no appointment to this latter office.

The joint committee appoint from time to time the clerk of the peace, and may remove him, but no mention whatever is made of the cause for which he may be removed, or of the mode in which the existence of that cause is to be ascertained, or of what is the procedure to be adopted to effect the removal. For all that appears on the face of this section, the clerk of the peace might be removed on a week's notice, or indeed without any previous notice at all. Again, there is no provision

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for removing the clerk of the peace from the office of clerk of the council. While he remains clerk of the peace he remains clerk of the county council.

It would appear to me that the real change effected is merely this, that the clerk of the peace takes on himself some additional duties relating to what is properly the business of the county council, and in relation to these duties he is named and described as clerk of the county council. Sub-s. 6 of this s. 83 supports, I think, this view. It runs thus : " The clerk of the peace, when acting in relation to any business of the county council, and when acting under the Acts relating to the registration of parliamentary voters, or to the deposit of plans or documents, or to jury lists, or to any registration matters, shall act under the direction of the county council, and all enactments relating to such business, registration or deposit shall be construed as if clerk of the county council were therein substituted for clerk of the peace." No doubt in s. 118 of the Act, the word " offices " is used, but it is applied to a clerk of the peace who was appointed to that office before the passing of the Act of 1888. The clause is aimed at securing for him his former tenure unaffected, applying, however, to a time previous to 1888 when he had only one office, that of clerk of the peace. Besides, by s. 100, the word " office " is defined to include any place, situation, or employment.

It would appear to me, therefore, that while the words " and may be removed by that joint committee . . . ." may possibly mean that the clerk of the peace may be removed arbitrarily for any cause or no cause, at the pleasure or even at the whim of the joint committee, they may also mean that the authority which is empowered to remove him is changed, is no longer the custos rotulorum, or the justices at quarter sessions, but is the standing joint committee; yet that the nature of the office remains unchanged, that it is still a freehold office from which the holder can only be removed, against his will, for misbehaviour. This latter construction does no violence to the language of the sub-section and is in harmony with the principles of the law which for centuries

have been held to apply to the removal from this ancient and important office of the holder of it. In my opinion this latter is the sound and just construction of the words used. I think, therefore, the decision of the Court of Appeal was right and that this appeal should be dismissed with costs.

LORD SUMNER (read by LORD BUCKMASTER). My Lords, the office of clerk of the peace is ancient and respectable. Long before 1888 it had been decided to be an office of freehold tenure at common law and one of its incidents was that the incumbent of it held during good behaviour. The statute 1 Wm. & Mary, c. 21, s. 5, expressly so provides ; s. 6 prescribes the manner of his discharge. If a clerk of the peace should misdemean himself in the execution of his office and a complaint thereof should be exhibited against him to the justices in quarter sessions and proved before them, they may lawfully suspend or discharge him. In 1864, by 27 & 28 Vict. c. 65, this was extended to misconduct rendering him unfit to hold his office, but not theretofore available for his removal, because he had not been guilty of it in the execution of his office. Such was the position in 1888.

The respondent was duly appointed to the clerkship of the peace for the county of West Sussex in November, 1913. No complaint in writing of any misconduct on his part has been presented or proved at quarter sessions, nor has any dismissal from office been ordered there. Neither in nor out of office has any allegation of misconduct been made against him. In April, 1924, the standing joint committee simply resolved, that the respondent could no longer continue to act as clerk of the county council, and invited him to resign his office of clerk of the peace. He refused, contending that he could not be thus dismissed, and thereupon in May, on the ground that he had failed to resign, the standing joint committee by resolution gave him notice to determine his appointment at December 26 next following, pursuant to the terms of the resolution under which they had originally appointed him. This had declared him to be appointed clerk of the peace and clerk to the county council " subject

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to the conditions following," which dealt with his salary and allowances for expenses, the provision of office accommodation for himself and of petty cash for his disbursements, and particularly added "(3.) Six months' notice shall be given on either side to determine the appointment."

It is contended for the standing joint committee that the change, by which the incumbent of an office, tenable during good behaviour, became an employee, who could be dismissed in this manner, was effected by the Local Government Act, 1888. That Act certainly does not make any such change in express terms. The most that it says is in s. 83, sub-ss. 1 and 2, which is headed "Officers": "The clerk of the peace of a county, besides acting as clerk of the peace of that county, shall also . . . . be the clerk of the county council, and . . . . he shall be from time to time appointed by the standing joint committee of the county council and the quarter sessions, and may be removed by that joint committee." Later on, s. 118, headed "Existing Officers," provides that a person previously appointed to the clerkship of the peace, when he continues in office after the passing and under the provisions of the Act, "shall, notwithstanding anything in this Act, hold his offices by the same tenure and have the same power of appointing and acting by a deputy as heretofore in his capacity of clerk of the peace."

The Act provided for the institution of elective county councils and for the transfer to them, along with other powers, of a specified part of the administrative business formerly belonging to the justices in quarter sessions; for harmony between the two authorities by the creation of a standing joint committee, consisting of members of both; and for continuity by requiring that the same person should be clerk to both the quarter sessions and the county council, to wit, the officer so long known in English life as the clerk of the peace. I am unable to see in the scheme or in the policy of the Act any intention to make extensive changes in the position of this officer or to affect him except in so far as this is done expressly. Generally speaking, s. 83 appears to be meant to enhance his status rather than to lower

it and, with s. 84, is in any case a minor provision, for these sections come in between "Proceedings of Councils and Committees" and "Regulations for Bicycles, &c." Sect. 83, sub-s. 2, no doubt transfers to the standing joint committee the power of appointment formerly vested in the custos rotulorum, and vests in that committee a power of removal, but this should naturally be construed as a mere change in the authority appointing to or removing from the office, and not as further altering the conditions, which attach to the functions of appointment and removal respectively. There still stood unrepealed the statute 37 Hen. 8, c. 1, s. 2, which required the custos rotulorum to grant the office of clerkship of the peace to "Such able person instructed in the lawes of this realme as shall be able to exercise and occupye the Same," and no one would read the words of s. 83, sub-s. 2, of the Local Government Act, 1888, as authorizing the new appointing authority to appoint (if they could persuade themselves that it was consistent with their duty to do so) a person ignorant of the law and incapable of exercising the office. A similar construction must apply to the rest of this sub-section. It gives to a new body in lieu of the justices in quarter sessions, the exercise of the powers theretofore exercised by those justices, which naturally implies misconduct as the cause of removal and, as the means, proof of misconduct, given as legal proof is given, before the sessions and upon written complaint duly exhibited.

The appellants, however, argue that this transfer is effected to a body so different from quarter sessions as to imply not a mere substitution of one authority's removal for another's, but a radical change in the terms and conditions on which such removal is to take place. There appears to be something in this. Sect. 30, sub-s. 1, says that: "for the purpose of . . . . the clerk of the peace . . . . and of matters required to be determined jointly by the quarter sessions and the council of a county, there shall be a standing joint committee of the quarter sessions and the county council"; and "(3.) Any matter arising under this Act with respect to . . . . the clerk of the peace . . . . and any other matter requiring to be

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determined jointly by the quarter sessions and county council, shall be referred to and determined by the joint committee under this section." Again, s. 78 provides that "(1.) All enactments in any Act . . . . relating to any business, powers, duties or liabilities transferred by . . . . this Act from any authority to a county council, either alone or jointly with the quarter sessions . . . . shall . . . . be construed as if—(*a*) any reference therein to the said authority . . . . referred to the county council or to a committee . . . . thereof . . . . as the case requires. . . . ." "(2.) Provided that the transfer of powers and duties enacted by this Act shall not authorize any county council or any committee or member thereof—(*a*) to exercise any of the powers of a court of record; or (*b*) to administer an oath; or (*c*) to . . . . perform any judicial business, or otherwise act as justices . . . . of the peace"; and finally ". . . . This section shall apply as if a joint committee were a committee of the county council."

It is argued that this section so widely differentiates the standing joint committee from the quarter sessions in respect of the mode of removal formerly provided that the old limited powers of removal must be deemed to have been impliedly repealed and totally new ones conferred. The old powers were exercisable by quarter sessions, which is a court of record and could and did administer oaths and perform judicial business. If s. 78, sub-s. 2, forbids all this to the standing joint committee, the new powers of removal can only be exercised in a totally different way, and that way can only be removal at discretion.

My Lords, I think there is a short answer to all this. A separate section—namely, s. 83, is provided for the changes in the position of the clerk of the peace, which the Act entails; and s. 78, which, as a whole, deals with transfers from "authorities" to the county councils, defines in sub-s. 4 what those authorities are in terms, which do not include either the custos rotulorum or the justices of the county in quarter sessions. I, therefore, do not take s. 78, sub-s. 2, as preventing the standing joint committee from giving the clerk of the peace the protection given by the Act of 1688

or as enabling them to destroy it. It is not necessary to discuss how, if at all, they are to observe the formalities there prescribed, for I am satisfied that, in whatever they do, they must be guided by a judicial spirit in exercising their power of removal, and even if there were no mode in which the old procedure could be observed by them, this would be no ground for going further and saying that they can now remove the clerk of the peace at pleasure and not merely for established misconduct.

Any other view of s. 83, sub-s. 2, than that above expressed, appears to involve the conclusion that it effected by implication a repeal of the above quoted sections of the Act of 1 Wm. & Mary and of the Clerks of the Peace Removal Act, 1864, and it appears to me that so serious a matter as this is not a case for implied repeal, unless far clearer grounds for the implication exist than can be found here. As to the latter Act it is contended that the Legislature has recognized this as conclusive, for it was, except as to existing officers, formally repealed by the Statute Law Revision (No. 2) Act of 1893. I think it may be inferred that the Legislature in 1893 thought that the Act of 1864 was no longer wanted. Whether this was because s. 83, sub-s. 2, of the Local Government Act of 1888 was supposed merely to have superseded it, as being a power of removal shortly describable as "such power as now exists"; or whether it was thought that the power of removal was now made unconditional and that accordingly s. 83, sub-s. 2, was inconsistent with the Act of 1864 and that s. 126 operated to repeal it in general terms, it is impossible to say. If, however, this question cannot be answered, the mere repeal of the Act of 1864 throws no certain light on the interpretation of the Act of 1888. The most rational assumption, and the one which I am content to adopt, is that the reason for the repeal is this. Since 1888 there is a power of removal generally. Whatever that may mean, a separate power to remove on limited local grounds —namely, misconduct out of office—is not needed. Whether it is removal at pleasure or removal for bad behaviour, the result is the same. The laconic terms of the Act of 1888

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cure the unnecessary precision of the Act of 1 Wm. & Mary, which had made the Act of 1864 necessary. The curious thing, however, is, if there is an extensive implied repeal, that this part of the Act of 1 Wm. & Mary has not yet been dealt with by any Statute Law Revision Act at all.

As to s. 118 it undoubtedly assumes that there may be some changes made by the Act, which, but for this clause, would adversely affect clerks of the peace theretofore appointed. I do not, however, think that it can be construed as pointing to a change from a tenure during good behaviour to a tenure at pleasure, and, if so, any obscurity as to the scope of the clause is for present purposes immaterial. It may, perhaps, be read as if the words " if there be anything " were inserted after " in this Act." I think there is a further consideration, which makes it unnecessary to imply all that an ordinary saving clause implies. A clear change was made, to the prejudice of new incumbents, at any rate in the matter of deputies. By 37 Hen. 8, c. 1, s. 2, it was lawful for a clerk of the peace, appointed by the custos rotulorum, to occupy and enjoy his office by his " sufficient deputy," admitted as such by the custos. After the commencement of the Local Government Act, 1888, when a deputy clerk of the peace was to act in lieu of the clerk of the peace himself, he was to be appointed by the joint committee to hold office during their pleasure (s. 83, sub-s. 4), but s. 118, in the case of clerks of the peace appointed before the Act, saved the right to exercise their office by deputies of their own appointment and extended it to the exercise of their office of clerk of the council, as well as to that of clerk of the peace. Similarly, such a person holds his offices by the same tenure as theretofore in his capacity as clerk of the peace, notwithstanding anything in the Act. Thus the clause is something more than a mere saving clause; it actually enables the pre-1888 clerks of the peace in their new position. The clerk of the peace appointed after 1888 does not, however, get this advantage, if advantage it be, but he does not therefore lose the advantage theretofore incident to the office, to which he has been appointed, that of clerk of the peace. By the Act this

appointment carries with it the appointment as clerk of the county council and, so long as he holds the first, he cannot lose the second; but, although the Act so provides and does so without providing anything as to good behaviour in the second and new office, to which the old statutes could not apply, nevertheless both offices are forfeited on misconduct in the first, so far as an old clerk of the peace is concerned, and nothing to be extracted from the Local Government Act, 1888, is to save him. In this regard the clerk of the peace appointed after 1888 stands simply on the Act. As clerk of the peace his tenure must depend on s. 83, viewed in the light of the pre-existing law and the objects of the Act. As clerk of the council his tenure depends on the provision of the Act, which requires both offices to be held by the same person. Thus the words "notwithstanding anything in this Act" do not point to any discrimination in it between the old clerks of the peace and the new to the prejudice of the latter, beyond what is involved in the difference between an old office and a new. So construed the words of s. 118 are all satisfied without matters being carried beyond the effect of s. 83, sub-s. 2.

If then the words of these sections can be satisfied otherwise, and if the scheme of the Act does not require the adoption of the appellants' construction, it only remains to consider the question of policy. The clerk of the peace in terms holds an appointment from which he is liable to be removed. This language leaves no case intermediate between removal for proved misconduct and removal without reason given and at pleasure. What policy is there in thus abruptly departing from a historic and appropriate tenure? The duties of the clerk of the peace are manifold; they are often legal in character and require to be discharged with quasi-judicial independence and impartiality. As Atkin L.J. well points out, in the matter of taxation of costs, the clerk's view of his duties as a legal official might bring him into conflict with the council's view of its duty towards the ratepayers. How can a clerk, who is the mere creation of the joint committee and dependent on its good pleasure, discharge imperturbably such a duty under such circumstances?

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Again, only six years before, the Municipal Corporation Act, 1882, s. 164, sub-s. 2, had secured to the clerk of the peace in quarter sessions boroughs precisely the tenure which the appellants contend that the Act of 1888 denied in counties to the clerk of the peace appointed for the first time after the Act came into force. The borough clerk of the peace was to hold office during good behaviour, without any words limiting this behaviour to action "in the execution of his office." This no doubt supplied, so far as boroughs were concerned, a sufficient reason for the repeal in 1893 of the Act of 1864. What reason can be suggested for a discrimination between borough and county clerks? The Act itself suggests none. It is true that the clerk of the peace is also to hold the additional office of clerk to the county council, but it cannot be said that the old clerkship of the peace has disappeared and a new and hybrid office has taken its place. It is suggested that grave inconvenience might arise in administrative matters in case of opposition in policy between the clerk and the council, if in such a case he could not be got rid of unless he was guilty of misconduct. Hence it is supposed to follow that good policy required that this official, alike as clerk of the peace and as clerk of the council, should be got rid of, if he could not agree with his masters' view. My Lords, I think there are two sufficient answers to this difficulty, such as it is. Before 1888 the justices in quarter sessions discharged large and important administrative duties as well as judicial ones, and managed to do so without any difficulty that I know of, though their single clerk was a clerk of the peace, holding his office during good behaviour. No reason then is apparent here for making a change in that year. Moreover, the Local Government Act, 1888, provides a remedy for such an inconvenience, if it were to arise. The standing joint committee have the power under the Act of providing a deputy to the clerk of the peace, who will be their deputy—not his—and will hold at their pleasure. They have the power, too, of assigning the administrative duties to him by requiring the clerk of the peace to act as they direct and to confine himself strictly to the duties of the clerk of the

peace to the sessions (s. 83, sub-ss. 4 and 6). In this way a practical remedy might be found in the improbable event o such a difficulty arising, without the necessity for supposing that the Legislature desired in 1888 to destroy the most characteristic and important feature of this ancient office, and to reduce it below the level of the same office in boroughs.

My Lords, I refrain from attempting to decide or even to discuss the question, whether the respondents' original appointment is or can be a mere contract of hiring by the standing joint committee of the day, by which the respondent became their paid servant, engaged to discharge the duties of a clerk of the peace, until they might see fit to dismiss him. The question has not been really raised nor have we the necessary materials for its decision. We have the terms of the resolution appointing the respondent, but not the evidence, if such there be, that he agreed to be bound by them, as by an offer accepted and binding as a contract. Many questions would arise. The standing joint committee are the creature of statute. Where does the statute confer on them power to make such a contract of hiring or to perform it by paying the salary as a consideration ? They are not a corporate body or capable of suing and being sued ; who, then, are the parties to enforce or to be liable upon this contract, the members of the committee of 1913 or the members to-day ? Is the so-called contract unenforceable on either side for defect of parties ? It seems to me that such discussion, if it ever arose, would be unprofitable, for the resolution of appointment is easily severable from the so-called " conditions," which are not really such. Where the duty is to appoint, the appointing words may well stand as a satisfaction of the statute, and the remainder be rejected as surplusage and as a mere misapprehension. Accordingly, my Lords, I think the appeal fails.

LORD WRENBURY. My Lords, it is impossible to read s. 118 of the Local Government Act, 1888, without seeing two things—namely, (1.) that it must be inferred that but for that section some alteration would or might result from

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the Act in the tenure of the office of clerk of the peace in the case of a person appointed to that office before 1888, and (2.) that the tenure of a person appointed after 1888 was not to be the same as that of a person appointed before that date. It remains, however, that the power of the joint committee to remove given by s. 83, sub-s. 2, of the Act may stand as a power to remove only under such circumstances as removal could have been made before 1888. The point which has most impressed me is that if the appellants are right the tenure of their office by clerks of the peace in counties and their independence in their office would suffer greatly as compared with that enjoyed by clerks of the peace in boroughs, so greatly as to make it improbable that the Act intended such a result. After weighing the whole matter and considering the other weighty matters dealt with in your Lordships' judgments I concur in thinking that this appeal should be dismissed.

LORD BUCKMASTER. My Lords, my noble and learned friend Lord Darling desires me to say that he concurs in my judgment.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, Oct. 23, 1925.

Solicitors for the appellants: *Kenneth Brown, Baker, Baker, for Wannop & Falconer, Chichester.*

Solicitors for the respondent: *Blundell, Baker & Co.*

[HOUSE OF LORDS.]

WHITNEY . . . . . APPELLANT;

AND

COMMISSIONERS OF INLAND REVENUE . . . . . RESPONDENTS.

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Revenue—Super Tax—Alien resident Abroad—Notice requiring Return of Income—Service by Post Abroad—Assessment in Default of Return—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 66, 72—*Income Tax Act*, 1918 (8 *& 9 Geo.* 5, *c.* 40), *ss.* 4, 7; *Sch. D.*

The appellant, a citizen of and resident in the United States, and having possessions in this country from which he derived a large income, was required by the Special Commissioners for the Income Tax Acts to make a return of his income for the purposes of super tax. Having failed to make the return, he was assessed by the Commissioners to the best of their judgment. The notice requiring him to make the return had been sent to him by registered post:—

Held (by Lord Dunedin, Lord Wrenbury and Lord Carson, Viscount Cave L.C. and Lord Phillimore dissenting), that the notice was validly served and that the assessment was rightly made.

Inland Revenue Commissioners v. *Huni* [1923] 2 K. B. 563 approved. Decision of the Court of Appeal [1924] 2 K. B. 602 affirmed.

APPEAL from an order of the Court of Appeal (Pollock M.R., Warrington and Sargant L.JJ.) (1) affirming an order of Rowlatt J. upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The following statement of facts is taken from the opinion of the Lord Chancellor:—

"The appellant and his wife were the holders of shares in a company registered and carrying on business in the United Kingdom, which in each of the tax years ending on April 5 in the years 1917, 1918, 1919, 1920 and 1921, respectively, paid a dividend on its shares; and in respect of each of those years the company was duly assessed to income tax and made a proportionate deduction from its dividends, the appellant and his wife thus bearing income tax by way of deduction.

* *Present:* VISCOUNT CAVE L.C., LORD DUNEDIN, LORD WRENBURY, LORD PHILLIMORE, and LORD CARSON.

(1) [1924] 2 K. B. 602.

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On March 10, 1920, the Special Commissioners of Income Tax, purporting to act under s. 72, sub-s. 2, of the Finance (1909–10) Act, 1910, and s. 7, sub-s. 2, of the Income Tax Act, 1918, caused notices to be sent by registered post to the appellant in New York requiring him to make a return of his total income from all sources for each of the years ending on April 5, 1918, April 5, 1919, and April 5, 1920; and on October 21, 1920, the Commissioners caused a notice to be sent to him in like manner requiring him to make a like return for the year ending on April 5, 1921, and the three preceding years. The appellant had no representative in the United Kingdom upon whom these notices could have been served. The appellant made no return, and thereupon the Special Commissioners, in pursuance of s. 72, sub-s. 5, of the Act of 1910 and s. 7, sub-s. 5, of the Act of 1918, made an assessment upon him to super tax in the sum of 90,000*l.* for each of the four years referred to in the notices in respect of the income arising to him and his wife from sources in the United Kingdom during the preceding year, and caused notice of the assessments to be sent by registered post to him in New York. The appellant appealed against these assessments to the Special Commissioners, who confirmed them, subject to a case stated for the opinion of the High Court; and their decision has been affirmed by Rowlatt J. and the Court of Appeal. The appellant has now appealed to this House."

1925. May 7, 8, 19. *Sir John Simon K.C.* and *Latter K.C.* (with them *Bremner* and *McMullan*) for the appellant. The appellant, a non-resident alien, is not liable to be assessed to super tax. A non-resident alien is not an "individual" within the meaning of s. 66 of the Finance (1909–10) Act, 1910, or s. 4 of the Income Tax Act, 1918. In construing the word "individual," which is used to exclude companies, some limitation is necessary. It cannot, for example, refer to a Chinaman in China who has nothing but a Chinese income. The reasonable limitation is to say that the term means an individual who is within the territorial jurisdiction

of Parliament. If income tax only is regarded the whole of the statutory machinery proceeds upon a territorial basis, and a non-resident cannot be charged unless that non-resident has an agent in the jurisdiction, when the assessment can be addressed to the agent, or unless income tax is got by deduction at the source, as in the case of payment of dividends. In the case of income tax strictly so called, direct assessment is territorially limited and the duty to make a return and the right of the Commissioners to call for a return are similarly limited. Then as to super tax: there is no ground for saying that Parliament has set up a super tax, which is an additional income tax, with a wider range of direct assessment or of the right to demand a return or the duty to make a return. Therefore, since there can be no deduction of super tax, this appellant was under no duty to comply with the demands addressed to him in New York, and nothing has occurred which founds the jurisdiction of the Commissioners to assess him upon his failure to make a return. On the true construction of the statutes it is not contemplated that a notice shall be served abroad to found jurisdiction, and a non-resident foreigner is not in default because he does not answer a letter sent through the post by the Commissioners. There cannot be a world-wide power to found jurisdiction by sending letters through the post. The appellant, a non-resident foreigner, not being capable of being assessed directly to income tax, is not liable to pay super tax at all. The profits which it is sought to tax are not income-taxable profits and therefore are not super-taxable profits. The governing principle is that all legislation is prima facie territorial: *Colquhoun* v. *Heddon* (1); *Ex parte Blain* (2); *In re Busfield* (3); *In re Anglo-African Steamship Co.* (4); *In re La Compagnie Générale d'Eaux Minérales et de Bains de Mer.* (5) *In re King and Co.'s Trade-mark* (6) is not opposed to this view. It proceeds on the distinction between founding jurisdiction against a man and telling him that

(1) (1890) 25 Q. B. D. 129, 134-5.
(2) (1879) 12 Ch. D. 522, 528.
(3) (1886) 32 Ch. D. 123, 132.
(4) (1886) 32 Ch. D. 348.
(5) [1891] 3 Ch. 451, 456.
(6) [1892] 2 Ch. 462, 482, 483.

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something is about to be done with his property. There was there no question of exercising jurisdiction against a non-resident person, and indeed Bowen L.J. recognizes that service cannot be effected abroad for the purpose of founding jurisdiction in the absence of express statutory authority. It is not doubted that Parliament might if it chose legislate so as to cover non-resident foreigners, but the appellant submits that it has not done so. The statutes in question in this case contain no language sufficiently clear to authorize service out of the jurisdiction, and it is for the Crown to show some special authorization: *Rex* v. *Aldrington, &c., Income Tax Commissioners.* (1) *Inland Revenue Commissioners* v. *Huni* (2) is wrongly decided, because the jurisdiction of the Commissioners to make an assessment arises only on default in making a return, and in that case, as in this, there was no default. Assuming that the appellant can be made liable to super tax there is in the Act no machinery by which he can be charged.

[They also referred to *Bradbury* v. *English Sewing Cotton Co.* (3); *Brooke* v. *Inland Revenue Commissioners* (4); *Tischler* v. *Apthorpe* (5); *Inland Revenue Commissioners* v. *Blott* (6); *Werle & Co.* v. *Colquhoun* (7); *Dyson* v. *Attorney-General* (8); *In re Cliff.* (9)]

Sir Douglas Hogg A.-G. and *Reginald Hills* for the respondents. Non-residence does not exempt from liability to income tax under any one of the Schedules, though in Sch. D the property to be brought into account is more limited in the case of a non-resident. The tax is not limited to British subjects or to residents in the United Kingdom. The only effect of the use of the word "individual" in s. 4, which deals with super tax, is to exclude companies. It is said that you would expect an individual to mean a person resident in this country. But that is not so. You would

(1) (1916) 85 L. J. (K. B.) 1753. [1923] 2 K. B. 563.
(3) [1923] A. C. 744, 770, 771.
(4) [1917] 1 K. B. 61; [1918] 1 K. B. 257.
(5) (1885) 2 Tax Cas. 89.
(6) [1921] 2 A. C. 171, 201.
(7) (1888) 20 Q. B. D. 753, 760; 2 Tax Cas. 402, 412.
(8) [1912] 1 Ch. 158, 168.
(9) [1895] 2 Ch. 21, 28.

expect him to be a person who was receiving income liable to British income tax. The Act itself lays down the limitation in explicit terms. Lord Herschell gives the answer to the appellant's first objection in *Colquhoun* v. *Brooks*. (1) The tax has a territorial limit; it is limited to persons who either reside in the United Kingdom or have taxable property in the United Kingdom. Super tax has the same range of liability as income tax. In s. 7, sub-s. 2, there is implicit the assumption that some non-resident persons are chargeable to super tax. That, therefore, gets rid of the appellant's first objection. But it is objected that there is no machinery for enforcing the charge. It is said that the Commissioners cannot found jurisdiction by sending a notice through the post; but the jurisdiction is given by the Act of Parliament. The notice sent by the Commissioners is not something which creates a liability, but the liability is created by s. 4. It is mere machinery for ascertaining the amount of the charge which the Act has independently imposed. If a foreigner fails to perform the duty of making a return or of giving the notice required by sub-s. 3 of s. 7, there is nothing very shocking in saying that he is liable to a penalty, although the penalty could not be recovered unless he came over here. In the case of super tax the Legislature have deliberately adopted a different machinery for its collection and have given to the Special Commissioners a jurisdiction coincident with the area of the charge. The non-existence of an agent in this country does not affect the generality of the charge: *Tischler* v. *Apthorpe* (2); *Werle & Co.* v. *Colquhoun* (3); *Rex* v. *Newmarket Income Tax Commissioners*. (4) There is nothing in s. 7 which cuts down the wide language of s. 4. If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship: *Partington* v. *Attorney-General* (5); *Drummond* v. *Collins*. (6) Sect. 4 speaks of "any individual" and s. 7 of "the duty of every person chargeable with super tax." Therefore the

(1) (1889) 14 App. Cas. 493, 503.
(2) 2 Tax Cas. 89.
(3) 20 Q. B. D. 753, 760, 763.
(4) [1916] 1 K. B. 788, 797.
(5) (1869) L. R. 4 H. L. 100, 122.
(6) [1915] A. C. 1011, 1018.

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letter of the law is directly in favour of the Crown. There is here no hardship and no reason for cutting down the generality of that language.

Sir John Simon K.C. in reply. By s. 7, sub-s. 2, every person on whom notice is served by the Special Commissioners is required to make a return of his total income from all sources, whether he is or is not chargeable with super tax. In the case of a non-resident, what is included in his total income from all sources ? If he fails to make a return he is liable to a penalty. "Failure" means not doing something which it is your duty to do : *Neilson's* case. (1) Where a statute creates a penalty there is prima facie a strong presumption that it has a territorial limit. The natural construction of these provisions is to say that the Legislature was contemplating machinery which operates within the jurisdiction.

[He also referred to *Reg.* v. *Jameson* (2) ; and *Barraclough* v. *Brown.* (3)]

The House took time for consideration.

1925. Nov. 6. VISCOUNT CAVE L.C. My Lords, this appeal raises the question whether the appellant, a citizen of the United States residing in New York, has been properly assessed to super tax. [His Lordship stated the facts.] Of the four assessments under appeal, the first two were made under the Finance Acts of 1910 and 1915, and their validity depends upon the construction of those Acts, while the remaining two were made under the Income Tax Act, 1918, and must be dealt with according to the meaning which may be put upon that Act. But as the Act of 1918 reproduced and consolidated all the subsisting provisions of the earlier Acts, it will be sufficient for the present purpose if I refer to the sections of the Act of 1918 without indicating in each case the corresponding sections of the earlier statutes.

My Lords, s. 4 of the Act of 1918 provides that super tax shall be charged in respect of the income of any "individual," the total of which from all sources exceeds a specified amount ;

(1) (1890) 18 R. 338. (2) [1896] 2 Q. B. 425, 430.
(3) [1897] A. C. 615, 624.

and it was argued on behalf of the appellant that the word "individual" (which is doubtless substituted in this section for the word "person" used elsewhere in the Act in order to exclude a corporation) must have some limitation, and that it should be read as confined to individuals who are within the territorial jurisdiction of the British Parliament and so as excluding persons resident abroad. I do not think that the operation of the section can be so limited. Super tax is described in the section as an "additional duty of income tax"; and income tax is expressly charged under Sch. D, para. 1 (*a*) (iii.), on the profits and gains accruing to a person not resident in the United Kingdom from any property in the United Kingdom or from any trade or employment carried on there. Further, s. 7, sub-s. 2, of the Act provides for returns to be made for super tax purposes by the representatives or agents of non-residents, and this provision would not have been made if all non-residents had been intended to be free from the tax. I think, therefore, that the word "individual" used in s. 4 is wide enough to include a non-resident who has an income in respect of which he is chargeable with ordinary income tax either directly or by way of deduction.

It was suggested that, if a non-resident is chargeable with super tax, he must be so chargeable in respect of his total income from all sources, including income received abroad and not remitted to this country, and that Parliament cannot have intended such a result. To this it was answered on behalf of the Crown that no such result follows, and that the charge is limited in the case of a non-resident to his "income-tax income," that is to say, to income in respect of which he is chargeable with ordinary income tax, either directly or by way of deduction. If this is so, it is certainly strange that so important a limitation was not expressed in the Act; and the answer presents some further difficulties. Sect. 5, sub-s. 1, of the Act provides that "for the purposes of super tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner

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as the total income from all sources is estimated for the purposes of exemption or abatement under this Act," subject to certain deductions allowed by sub-s. 3 of the same section; and the Finance Act, 1920, Sch. 3, provides that for the words "estimated for the purposes of exemption or abatement under this Act" there shall be substituted the words "required to be estimated in a return made in connection with any claim for a deduction from assessable income." Now, when reference is made to the sections of the Act which deal with exemption and abatement, it appears that the total income to be estimated under those sections includes some income which is not chargeable with ordinary income tax. Thus, under the proviso to s. 26, certain persons there described, including a person resident abroad for the sake of health, can only obtain exemption or abatement on the terms of calculating their total income from all sources in respect of which tax may not be chargeable, as well as income in respect of which tax is chargeable. This appears to me to create a serious difficulty in the way of the Crown. But, nevertheless, I agree that it is impossible to impute to the Legislature an intention to tax an alien resident in his own country on his total income, British and foreign, for the sole reason that he has invested a substantial sum in this country; and, accordingly, that such a person, if chargeable with super tax at all, is chargeable on his income-tax income and no more. But the fact that the charge is not so limited by the statute points to the conclusion that an alien non-resident is not intended to be subject to the charge.

But the important and difficult question remains, whether the Act of 1918 provides machinery for assessing to super tax an alien resident abroad and having no representative in this country. It has been held in a series of cases, such as *Tischler* v. *Apthorpe* (1) and *Werle & Co.* v. *Colquhoun* (2), that the power given by s. 41 of the Income Tax Act, 1842 (now represented by r. 5 of the General Rules applicable to all Schedules in the First Schedule to the Act of 1918), to charge a person resident abroad in the name of

(1) 2 Tax Cas. 89; 52 L. T. 814. (2) 20 Q. B. D. 753.

a person acting on his behalf in the United Kingdom is an additional power given to the revenue authorities and does not prevent them from assessing a non-resident person if he is found here; and in *Brooke* v. *Inland Revenue Commissioners* (1) this principle was applied to super tax. As Mathew J. put it in *Tischler* v. *Apthorpe* (2), "if the principal can be got at there is no need to have recourse to s. 41 or to have recourse to s. 44. Where the case arises, contemplated by section 41, one resident abroad who cannot be reached by the Commissioners, then the Commissioners are entitled to fall back upon the valuable and useful provisions contained in those two sections." But this leaves untouched the question whether, if the person sought to be charged is an alien having no representative in this country and incapable of being "reached by the Commissioners" here, he can be personally served with a notice of assessment or with a notice preliminary to assessment while he is abroad; and this is the question which has to be answered in the present case. It was answered in the affirmative by Rowlatt J. in *Inland Revenue Commissioners* v. *Huni* (3) and by Rowlatt J. and the Court of Appeal in the present case, and has now to be finally determined by this House.

My Lords, the question so raised must in the main be tested by an examination of the provisions of s. 7 of the Income Tax Act, 1918, which alone provides the machinery for an assessment to super tax; and having carefully considered the terms of that section I have come to the conclusion that it is not applicable to cases such as this. Sect. 7, sub-s. 1, enacts that "super tax shall be assessed and charged by the Special Commissioners," thus excluding the system of local assessments which is applicable to ordinary income tax; but that sub-section must (I think) be read with the succeeding parts of the section which prescribe the manner in which the assessment and charge are to be made. Sub-s. 2 is in the following terms: "Every person upon whom notice is served,

(1) [1917] 1 K. B. 61; [1918] 1 K. B. 257.
(2) 2 Tax Cas. 93.
(3) [1923] 2 K. B. 563.

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in manner prescribed by regulations under this section, by the special commissioners, requiring him to make a return of his total income from all sources, or, in the case of a notice served upon any person who is chargeable with or liable to be assessed to income tax, as representing an incapacitated, non-resident or deceased person, of the total income from all sources of the incapacitated, non-resident or deceased person, shall, whether he is or is not chargeable with super tax, make such a return in the form and within the time required by the notice."

This enactment, which does not (as was suggested) give a privilege but imposes a duty, is plainly binding upon any person (whether British or not) who is within the jurisdiction; and it may be—though on this I express no opinion—that it binds a British subject resident abroad. But it is difficult to believe that the Legislature of this country can have intended to impose such a duty upon a subject of a foreign country resident and being in that country, whether he is or is not chargeable to super tax here. The difficulty is increased when it is noted that by sub-s. 3 of the same section it is made the duty of every person chargeable with super tax to give notice to the Special Commissioners that he is so chargeable—an enactment which is surely inapplicable to an alien resident and being out of the jurisdiction, who cannot be assumed to have any knowledge of our law; and that by sub-s. 4 any person who without reasonable excuse fails to make any return or to give any notice required by the section is made liable to an immediate and a continuing penalty. By what right such a penalty could even in express terms be imposed upon an alien resident and being abroad, it is not easy to understand; and it appears to me that sub-ss. 2 to 4 cannot have been intended to apply to such a person. Now the power given by sub-s. 5 to the Special Commissioners to make an assessment to super tax "according to the best of their judgment" is contingent on "failure" to comply with the obligation to make the return under sub-s. 2; and I see no escape from the conclusion that, where no such obligation exists, there can be no such "failure" to

comply with it and accordingly that in such a case an assessment under sub-s. 5 cannot be made. The case is similar in some respects to the case of *Neilson* (1) and to *Dyson* v. *Attorney-General*. (2)

In the course of the argument some discussion took place as to the effect of a regulation made by the Special Commissioners under s. 72, sub-s. 8, of the Finance Act of 1910 and continued in force by s. 238 of the Income Tax Act, 1918. This regulation prescribes that any notice required to be served on any person under the regulations may be sent by post by registered letter addressed to such person at his usual or last known place of abode, and that such service shall be deemed sufficient service for the purpose of the regulations. It does not appear to me that this regulation has a close bearing upon the point arising for decision in this case. When a notice is sent by post, the postal authorities are only the agents of the sender to deliver the notice. The position is the same as if the sender—in this case the Special Commissioners—had sent a messenger abroad to serve the notice there upon the appellant in person; and if (as I hold) personal service of the notice in this case could not have been effectively made upon the appellant in New York, it follows that the service by post was equally ineffective. The regulation cannot alter the construction of the Act or enlarge the Commissioners' jurisdiction: see per Lord Davey in *Barraclough* v. *Brown*. (3)

Reference was also made to cases in which a document, not being a writ or other legal process, has been held to be capable of being served out of the jurisdiction; but these cases do not appear to me to be very material. The question, as it presents itself to me, is not whether the notices could be served out of the jurisdiction, but whether they could be so served upon an alien resident out of the jurisdiction; and this must depend upon the construction of the statute and not upon any rule as to service.

My Lords, the judgment of Rowlatt J. in *Huni's* case (4)

(1) 18 R. 338.
(2) [1912] 1 Ch. 158.
(3) [1897] A. C. 615, 624.
(4) [1923] 2 K. B. 563.

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and of the Court of Appeal in the present case, appear to proceed upon the view that it is immaterial whether service of a notice under s. 7, sub-s. 2, upon an alien resident abroad does or does not create a legal obligation binding the person served, or whether sub-ss. 3 and 4 of the same section are or are not enforceable against him, and that in the case of such a person it is sufficient that he has been invited to make a return and has been told that if he does not do so the Commissioners will assess him according to the best of their judgment. The Commissioners can then, it is said, act under the general authority to assess and charge super tax conferred upon them by sub-s. 1 of the section, and may assess him as best they may. Rowlatt J., in *Huni's* case (1), dealt with this point as follows: "Now it seems to me that the machinery created by this section has several aspects. It may lead to the commission of an offence. What effect that has abroad it is not for me to say now. It creates a duty. What the result of that is as such I do not know, and I am not called upon to say. But I think it also operates as a notice and no more. If a separate section had been framed in somewhat less imperative language, it could have been made quite clear. I think however there is involved in this machinery the mere giving of a notice as a preliminary to the Commissioners proceeding to do something which they are entitled to do with regard to the respondent in respect of his present or past property in this country, and that I ought not to limit the words of the statute so as to make this notice as a mere notice null and void."

With the greatest respect for the opinion of the learned judge, I do not think that sub-ss. 2 to 4 can be so brushed aside. The section must be read as a whole. Sub-s. 1 is quite general in its terms and gives no authority to the Commissioners to make an assessment in any particular way. The manner in which they are to exercise their powers of assessment and charging is laid down in the sub-sections which follow, and it is only if the person alleged to be chargeable with tax "fails" to comply with a notice under sub-s. 2 that

(1) [1923] 2 K. B. 563, 572.

the Commissioners are authorized to make an assessment upon him to the best of their judgment (which in one case has been referred to as a "random" assessment) under the fifth sub-section. The suggestion which was made during the argment that an assessment so made could be revised on proceedings being taken to enforce it, appears to be negatived by s. 176 and other sections of the Act. Further, it is expressly stated in the respondents' case upon this appeal that the Commissioners in making the assessments purported to act in pursuance of s. 72, sub-s. 5, of the Finance Act, 1910, or the corresponding provisions in the Income Tax Act, 1918; and I fail to see how in face of this statement the respondents can now be permitted to lay aside sub-s. 5 and to claim that they acted under the general power in sub-s. 1. The course prescribed by the section is that notice shall be first given to the person to be charged to make a return, and it is only if he fails to comply with this obligation that he can be assessed at the Commissioners' discretion. If the machinery provided for assessment is not applicable to the case, then there is no power to tax.

My Lords, the conclusions at which I have arrived on the sections of the Act dealing with super tax are confirmed by a reference to the sections dealing with ordinary income tax. Super tax is an additional duty of income tax (s. 4), and by virtue of s. 7, sub-s. 6, all provisions of the Act relating to persons who are to be chargeable with income tax and to income tax assessments are, so far as they are applicable, to apply to the charge and assessment of super tax. Now it was not suggested in the argument before your Lordships that a notice relating to income tax could be served upon an alien resident abroad, and this although under s. 220, sub-s. 5, of the Act and the regulations made by the Commissioners under s. 36 of the Finance Act of 1915 income tax notices may be served by post. Further, s. 101 of the Act of 1918 (which in this respect reproduces s. 53 of the Act of 1842) refers to a person not resident in the United Kingdom as a person who by reason of such non-residence "cannot be personally charged" under the Act, and similar expressions are to be

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found in s. 103 and in rr. 3 and 5 of the General Rules applicable to all the Schedules. Although the express statement of the impossibility of a personal charge on a non-resident is not to be found in s. 7, sub-s. 2, yet the terms of that sub-section referring to the notice to be sent and served on a representative of a non-resident assume that the impossibility exists. It appears to me that the whole statute is framed on the basis that direct assessment, whether to income tax or to super tax, can only be made upon persons who are or reside in this country or on representatives in this country of persons who reside abroad; and that if it is desired to have effective machinery for charging with super tax an alien resident and being abroad who has no representative here, that machinery must be provided by an amendment of the statute.

If your Lordships should agree with the view which I have put forward, it will follow that the decision in *Inland Revenue Commissioners* v. *Huni* (1) must be deemed to be overruled.

I am of opinion that this appeal should be allowed and the assessment set aside, with costs here and below.

LORD DUNEDIN. My Lords, the noble and learned Lord on the Woolsack has come to a conclusion as to two points on which I am in entire concurrence with him. First, he considers that any individual who receives profits from property in the United Kingdom is liable to super tax, and second, he holds that the income of the individual from all sources mentioned in s. 4 of the Act is income which is taxable within the United Kingdom. I shall therefore do no more at this stage than indicate with the utmost brevity the considerations which led me to the same conclusion.

As regards the first, there are the express words of Sch. D, which, dealing with ordinary income tax, says that "tax under this Schedule shall be charged in respect of—(*a*) the annual profits or gains arising or accruing . . . . (iii.) to any person, whether a British subject or not, although not resident in the United Kingdom, from any property whatever in the United Kingdom"; and then there are the words of s. 4

(1) [1923] 2 K. B. 563.

which describe the super tax thereby imposed as an additional duty of income tax, which words are explained in a very luminous judgment of the late Lord Parker, then Parker J., in the case *Bowles* v. *Attorney-General.* (1) The point was decided in terms by the Court of Appeal in *Brooke* v. *Inland Revenue Commissioners.* (2)

As to the second, there is the consideration that according to s. 5, sub-s. 1, for the purposes of super tax the total income of any individual from all sources is to be estimated in the same manner as the total income is estimated for the purposes of exemption and abatement. Now, when you come to the section dealing with exemption you find, s. 9, that the total income, which to entitle relief is not to be above the figures specified in the succeeding sections, is income " estimated in accordance with the provisions of this Act," and income of a non-resident in the United Kingdom accruing out of the United Kingdom and not brought within the United Kingdom does not fall to be estimated according to the provisions of this Act.

Further, I am not troubled with s. 26, which has given my noble and learned friend some hesitation. For the clause there is not a substantive provision, but is only a proviso to a clause excepting from the privilege of exemption and relief those who are non-resident. It has nothing to do with the general scheme of the statement of income. Further, I would add that s. 5, sub-s. 2, seems to me to point strongly the same way. Sub-s. 2 provides that where an assessment to (ordinary) income tax has become final, that is also final as regards the income from all sources for the purposes of super tax, thus showing that income which is not liable to income tax, i.e., income of a non-resident accruing abroad and kept abroad, is not to be taken into account in the matter of super tax.

I must, however, remark that this sub-section cannot be further pressed for the purposes of this case, for if the Scottish case, which was not quoted to us, of *Duncan* v. *Inland Revenue* (3) was rightly decided—and I take it

(1) [1912] 1 Ch. 123. (2) [1918] 1 K. B. 257.
(3) 1923 S. C. 388.

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it was—it has no application to income such as that in the present case, where deduction for ordinary tax is made at the source.

My Lords, I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay.

Now I have already dealt with the first stage. I come to the second, and that, so far as super tax is concerned, is dealt with in s. 7. Sub-s. 1 says that super tax shall be assessed and charged by the Special Commissioners. That does away with all of what I may call the territorial arrangements which apply to ordinary income tax. Next follow a set of sub-sections which provide for means which may help the Special Commissioners in their task. It is here that I part company with the noble and learned Lord Chancellor. Holding that sub-ss. 2, 3 and 4 setting forth the request for and the making of the return of income from all sources are inapplicable to an alien non-resident in the United Kingdom, he concludes that where no return has been made there can be no failure in the sense of sub-s. 5, and that accordingly no assessment can be made. My Lords, I cannot help feeling with the utmost respect that that is tantamount to making liability dependent on failure to make a return, and yet ex hypothesi a liability is already established. But my real reason for differing from my noble and learned friend is that I look on these sub-sections as mere aids to the Special Commissioners in

their task, and not as conditions of their power. That power is, to my mind, conferred by sub-s. 1. As in the case of *Tischler* (1) and *Werle* (2) it was held that the power given to charge a resident abroad in the name of a person acting on his behalf in the United Kingdom did not prevent a direct assessment on that person if he was in fact found in the United Kingdom, so by analogy I think that the failure of some of the provisions of the succeeding sub-sections to fit a particular case, does not prevent the Special Commissioners proceeding under the powers of sub-s. 1. It is, I think, apparent that the Special Commissioners are bound, if they can, to adopt the methods provided by the succeeding sub-sections, and so I think indeed they have done. They have sent a notice requiring particulars in the only way available to them—namely, by post, and it is admitted that that notice was received. The next step lay with the appellant, and he made no return, and I agree that the penalty section is inapplicable. For the appellant is not subject to the jurisdiction of the English Court, nor has the British Parliament power to enjoin him personally to do anything.

Then comes sub-s. 5. I think that he failed to make a return, for I read "failure" in the sense of "de facto did not make," not in the sense of "contrary to law did not make." Accordingly, I think the Special Commissioners were authorized to make an assessment according to the best of their judgment. But quite apart from that I think that under s. 1 they were entitled to assess. I lay stress on that for this reason. It might have been that the notice never reached him. I think that the Commissioners would still have been entitled to assess, but the difference would have been that, if and when the appellant came to know of the assessment made, he would have been absolutely entitled to be heard as to the amount, and if necessary to get it altered under the powers conferred on the Commissioners by sub-s. 7; whereas when there has been failure by a person who is bound to furnish the notice under s. 3, I imagine that there is no absolute right on the part of the person assessed to

(1) 2 Tax Cas. 89. (2) 20 Q. B. D. 753.

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have the assessment altered, although I doubt not, as the object of the Act is to tax people justly and not unjustly, that the Commissioners would even then be ready to consider the question of the amendment of an assessment quite unjust as to amount.

My Lords, I think that I have expressed in somewhat different words what was said by Rowlatt J. in *Huni's* case. (1) I think that the case was well decided, and I therefore move that this appeal should be dismissed with costs.

LORD WRENBURY. My Lords, some of the years here in question are before and some after the Income Tax Act, 1918. There is no need to discriminate between them, for the language of the enactments relevant in the matter here in dispute is the same, whether the year in question be before or after 1918.

Sch. D provides as follows: "Tax under this Schedule shall be charged in respect of—(*a*) The annual profits or gains arising or accruing—. . . . (iii.) to any person, whether a British subject or not, although not resident in the United Kingdom, from any property whatever in the United Kingdom, or from any trade, profession, employment, or vocation exercised within the United Kingdom."

It is therefore beyond possibility of dispute that a non-resident alien is chargeable with tax under this British statute under some circumstances. The only possible question is whether the non-resident alien is chargeable with tax under the circumstances of the present case.

The policy of the Act is to tax the person resident in the United Kingdom upon all his income whencesoever derived and to tax the person not resident in the United Kingdom upon all income derived from property in the United Kingdom. The former is taxed because (whether he be a British subject or not) he enjoys the benefit of our laws for the protection of his person and his property. The latter is taxed because in respect of his property in the United Kingdom he enjoys the benefit of our laws for the protection of that property.

(1) [1923] 2 K. B. 563.

Lord Herschell, in *Colquhoun* v. *Brooks* (1), expressed this by saying that "the Income Tax Acts . . . . themselves impose a territorial limit; either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there."

My Lords, in my opinion the key to the solution of the question which arises in the present case is to be found in the words which I have quoted from Sch. D. There is no question but that the non-resident alien is taxable for something. He certainly, for instance, is taxable to income tax in respect of income upon which tax can be deducted at the source. If he is to be non-taxable under some circumstances in respect of income arising from property in this country, I think that words addressed to his particular case must be looked for in the statute expressing him to be free from that liability.

In the present case the property is, the person is not, within the United Kingdom. The person is a non-resident alien—an American subject residing in the United States. He is not here, but he draws a large income from property here. The question is whether he is taxable for super tax in respect of that property.

There are in the Income Tax Act, 1918, two charging sections—namely, s. 1, relating to income tax; and s. 4, to super tax. Sect. 1 charges income tax in respect of all property, profits or gains described in (amongst others) Sch. D. The charge is "in respect of" the property. The charge is upon the person in respect of the property. Sect. 4 charges "an additional duty of income tax (in this Act referred to as super tax)." The charge is "in respect of the income of any individual, the total of which from all sources exceeds" a certain sum. As to the meaning of the word "individual," I agree with that which has been said by the Lord Chancellor. It includes the person sought to be charged in this case.

As regards the word "income" I agree again with the

(1) 14 App. Cas. 493, 504.

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conclusion at which the Lord Chancellor has arrived. It means such income as is within the Act taxable under the Act. Sect. 5, sub-s. 1, assists in taking this view. The Act has nothing to do with the foreign income of one who is not a British subject and who is not resident here. The territorial limit of the Act to which Lord Herschell referred in *Colquhoun* v. *Brooks* (1) does not extend to the foreign income of the person who is foreign both by nationality and by residence. The Act nowhere purports to tax income which is neither derived from property in the United Kingdom nor income received by a person resident in the United Kingdom. The word "income" wherever found in the statute is to be understood as excluding income neither so derived nor so received. But it includes all other income by virtue of the express words of Sch. D. If the person is resident in the United Kingdom his income from property, whether in the United Kingdom or not, is charged. If he is not resident in the United Kingdom his income from property in the United Kingdom is charged, whether he is a British subject or not. So far it is, I think, plain that the non-resident alien is to the extent above stated charged with the tax. This is true of income tax and is equally true of the additional duty of income tax called super tax.

My Lords, in my opinion, under the express words of Sch. D the non-resident American is chargeable in respect of income arising from property in the United Kingdom.

There is a second question in the case—namely, whether the appellant has been duly brought within the machinery for assessment provided by the Act. This turns upon s. 7. There was sent to the appellant by post addressed to him in the United States a notice under s. 7, sub-s. 2, requiring him to make a return. It is contended that there was no right to post him such a notice so addressed. The case, it is contended, is similar to the case of service of a writ out of the jurisdiction. I do not agree. It is similar rather to the service of a notice of dishonour of a bill or of a notice to quit or of a notice requiring payment of calls upon shares as a

(1) 14 App. Cas. 504.

preliminary to forfeiture in default of payment. It is not a step in a judicial proceeding but a step which will create inter partes a state of things in which judicial proceedings can subsequently be taken in default of compliance. I think the notice was duly served. In my opinion *Inland Revenue Commissioners* v. *Huni* (1) was rightly decided.

But even if this is not so it remains that s. 7, sub-s. 1, in providing that super tax shall be assessed and charged by the Special Commissioners, has given them an authority and has imposed upon them a duty which remains in them even if the machinery of the subsequent sub-sections fails to meet the case.

Sect. 7, sub-s. 1, is self-contained and imperative. Sect. 4 has imposed a charge. Sect. 7, sub-s. 1, has imposed upon the Special Commissioners the duty of assessing the amount. Sub-ss. 2 to 5 do no more than supply machinery for giving effect to sub-s. 1. But there are no words to the effect that if that machinery is inapplicable to the particular case, the duty in sub-s. 1 shall fail to exist and shall not be performed. Under s. 7, sub-s. 3, it is the duty of every person chargeable with super tax to give notice that he is chargeable. If, therefore, I am right in thinking that the non-resident alien is chargeable in respect of property in the United Kingdom, it was his duty to give that notice, and whether he performed that duty or not and whether the notice addressed to him out of the United Kingdom was duly served or not, it remains that s. 7, sub-s. 1, stands as a statutory duty which the Special Commissioners must discharge to the best of their ability, leaving the party assessed to his remedy if he is in a position to prove that the assessment made upon him is excessive. The power of the Commissioners to assess in default of a return is not an exclusive power to assess. Their power and duty to assess arises not only in the case in which the taxpayer makes default, but because sub-s. 1 gives them power to assess and imposes upon them the duty to do it. If (but for this point) the liability exists I am unable to agree in the view that the liability is non-existent if it

(1) [1923] 2 K. B. 563.

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be found that the machinery provided by the Act does not fit the case.

I rest my judgment upon this second question, however, on the first ground—namely, that the notice could be posted to the alien abroad.

Upon both questions I think that the Crown succeeds, and that this appeal ought to be dismissed.

LORD PHILLIMORE (read by LORD CARSON). My Lords, by s. 4 of 8 & 9 Geo. 5, c. 40, an additional duty of income tax (in the Act referred to as super tax) is charged in respect of the income of any individual, the total of which from all sources exceeds 2500*l.*

And by s. 5, the total income for this purpose is to be estimated in the same manner as the total income from all sources is estimated for the purposes of exemption or abatement under the same Act, with certain provisoes not material to the present case.

Mr. Whitney's income so estimated is certainly above 2500*l.* a year, and he is certainly an individual.

But is he an individual who is intended to be subjected to this taxation? He is a foreigner and non-resident. He has not been at any material time even temporarily in this country.

Parliament has not by this Act arrogated a right to tax all the world of well-to-do men. That is conceded. What, then, is the limit?

It is suggested that super tax follows income tax, that Mr. Whitney is taxable to income tax in respect of part of his property, that is, in respect of his investments in Great Britain, and so should be subject to super tax in respect of the income from that property exceeding 2500*l.*

My Lords, I can see no such limit. I find that individuals are to be taxed. I can see that it cannot be all the individuals in the world. There must be some qualification. I could understand that the limit might be all income-taxable individuals; but I see no justification for so violent a gloss as would confine the word "individual" to all income-taxable

individuals and then apply it only in respect of their income-taxable property, and not, as the statute provides, in respect of their income from all sources.

I turn now to the mode in which the income of a super-taxable individual is to be ascertained. I get this by reference, as directed by the statute, to claims for exemption or abatement. These are provided for by ss. 9 to 31.

I find in s. 27 that a person claiming exemption or abatement must state all the particular sources from which his income arises. I imagine Mr. Whitney making this return. Where would he find warrant for omitting from his return his income derived from investments in America? And if he is to return this income, what provision is there for his not being assessed upon it? But counsel for the Crown agree that he is not to be so assessed.

Exemption and abatement cases are as a rule only for persons resident in the United Kingdom. But there are under s. 26 certain exceptions in favour of persons residing abroad, and it is clear that in those cases income from all sources "including any income in respect of which tax may not be chargeable, as well as income in respect of which tax is chargeable" is to be included.

What is a non-resident to do who is told to return for super tax purposes his total income estimated as it would be for purposes of exemption or abatement? How is he to make a true return and one according to the form and yet avoid being assessed upon non-assessable income? What is to happen if his income from British sources is under the super tax limit, but his total income from all sources above it?

A point was made by the Attorney-General on the words of s. 5, sub-s. 3 (*b*), where it is contemplated that an individual subject to this tax may be in the service of the Crown abroad, which he said showed that the tax was intended to be charged on non-residents. It seems to me a slender basis on which to build the argument. To begin with, the service may be for no long period and may be quite consistent with the subject having a residence in this country. Further, it is possible that the statute intends to treat public servants drawing

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their money from the revenues of the State, only temporarily non-resident (and many of them will be diplomats whose foreign residence is extra-territorial), as for this purpose in a position equivalent to residents.

The second point made by counsel for the appellant turned upon questions of procedure. I do not think that the two points can be separated. If I felt sure that Parliament had intended to tax individuals in the position of the appellant, I should struggle to adapt the procedure; though I might in the end find that such an adaptation made too violent a demand upon the language of the statute.

But if I find that the procedure is inapplicable, this will be a strong reason for supposing that Parliament did not intend to tax this class with this tax.

Now in the first place your Lordships have to consider sub-ss. 3 and 4 of s. 7. If people in the position of the appellant are chargeable with super tax, they must give notice to the Special Commissioners, and their failure renders them liable to a penalty.

If a non-resident, and especially a non-resident alien, should be minded to come to this country for the purpose of visiting the exhibition at Wembley, would it not be monstrous if he were suddenly prosecuted for this penalty? It seems to me no answer to suggest that in the circumstances the penalty imposed would be a nominal one. He would have been treated as a lawbreaker.

Then again no assessment can be made except after failure to make a return or upon the making of an unsatisfactory return. It has been suggested that sub-s. 1 of the same section gives power to the Commissioners in special cases to arrive at an assessment in any way they think proper; but in my opinion that is not so. Sub-s. 1 only makes them the officers to determine. The conditions of this determination are to be found in sub-s. 5. It is only when there is a failure or an unsatisfactory return that they are enabled to make an assessment according to the best of their judgment. Failing the condition precedent, they have no jurisdiction.

Then let me consider the form of return which the individual

is required to make. "Return" is a word of art familiar in our law, as for example the return to a writ. This form would require him, as I have already observed, to make a return of his total income from all sources for the previous year, or, in the language of the declaration which he signs, "the whole of my income from every source whatsoever," which further is to be "estimated according to the provisions of the Income Tax Acts."

I am not sure whether there is any duty on non-resident British subjects, and one should perhaps add not merely non-resident here but domiciled abroad, to know the provisions of our Income Tax Acts. But I am sure that it is not the duty of a non-resident and undomiciled alien to know them.

I pass over minor objections to the form, but I think it convenient to refer to what was said by Cozens-Hardy M.R. in *Dyson* v. *Attorney-General* (1) concerning the at one time famous "Form 4." "The return," he says, "is one and indivisible. No penalty could be exacted for omitting to make an unauthorized return."

I would further fortify myself by two authorities.

In *Exparte Blain* (2) James L.J. speaks of "the broad, general, universal principle that English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English Court to give effect to an English statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction."

In *Colquhoun* v. *Heddon* (3) Lord Esher M.R. says: "It seems to me that, unless Parliament expressly declares otherwise, in which case, even if it should go beyond its rights as regards the comity of nations, the Courts of this country must obey the enactment, the proper construction to be put on general words used in an English Act of Parliament is, that Parliament was dealing only with such persons or things

(1) [1912] 1 Ch. 158, 166. (2) 12 Ch. D. 522, 526.
(3) 25 Q. B. D. 129, 134.

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as are within the general words and also within its proper jurisdiction. . . . ."

It has been said that no point was made of Mr. Whitney being an alien. But it is a point that, if the statute should be construed as the Crown desires, it must include aliens.

Lord Phillimore.

Putting all these matters together, I think that, as the law at present stands, the appellant is not liable to super tax, and I see no great harm in coming to that conclusion. If it is desired, it would be easy for Parliament to express the liability in plain language and direct the necessary modification in the procedure.

Meanwhile, there would be no harm, in my humble judgment, in giving to those responsible for the finances of the country the opportunity of considering the familiar saying about the bird with the golden eggs.

My Lords, my sentence would be for allowing this appeal.

LORD CARSON. My Lords, I am of opinion that this appeal fails. As I am in complete agreement with the reasoning and conclusions arrived at by my noble and learned friends, Lord Dunedin and Lord Wrenbury, I do not think it necessary to add anything.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, NOV. 6, 1925.

Solicitors for the appellant: *Clarke, Rawlins & Co.*

Solicitor for the respondents: *The Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

BATCHELOR . . . . . APPELLANT; H. L. (E.)*

AND

1925 Nov. 19

MURPHY AND ANOTHER . . . . . RESPONDENTS.

Landlord and Tenant—Lease—Option to purchase—Agreement for Transfer of Residue of Term to new Tenants by Surrender of Lease and Execution of new Lease on the same Terms and Conditions—New Lease not granted—Acceptance of Rent by Lessor—Exercise of Option by new Tenants.

A lease contained an option for the lessee, his executors, administrators and assigns to purchase the freehold reversion. By a memorandum of agreement addressed to the executor of the lessor and signed by the lessee and the respondents, it was agreed that, in consideration of the executor releasing the lessee and accepting the respondents as lessees for the residue of the term, the lease should be surrendered and a new lease executed by the respondents for the residue of the term "on the same terms and conditions in all respects" as those of the original lease. No new lease was ever executed by the respondents, who entered into possession and paid rent to the executor for several years. The respondents duly gave notice to exercise their option to purchase, but the executor disputed their right:—

Held, that the word "lease" in the memorandum meant the document and not the demise, and that the option of purchase, although not a term of the demise, being included in the original lease, was in substance transferred by the lessee to the respondents.

Decision of the Court of Appeal [1925] Ch. 220 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing an order of Tomlin J. (2)

By a lease dated October 17, 1913, Mrs. Susannah C. Batchelor demised a shop at Bridlington to Herbert W. Clarkson (therein described as "the lessee," which expression was defined as including his executors, administrators, and assigns) for a term of $10\frac{1}{2}$ years from October 6, 1913, at a rent of 100*l.* for the first year, and thereafter a yearly rent of 120*l.* The lease contained a provision for an option to be exercised by the lessee during the term by three calendar months' notice in writing for the purchase by the lessee of

* *Present:* VISCOUNT HALDANE, LORD ATKINSON, LORD WRENBURY, LORD CARSON, and LORD BLANESBURGH.

(1) [1925] Ch. 220. (2) [1924] 2 Ch. 252.

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the inheritance in fee simple in possession free from incumbrances of the demised premises at the price of 3000*l.*

Mrs. Batchelor, the lessor, died on May 22, 1915, having by her will appointed John Henry Sawden and the appellant, Hugh Batchelor, to be her executors, and the will was proved by Sawden alone, power being reserved to the appellant to prove.

On November 17, 1915, a memorandum in the following terms was signed by Clarkson, the original lessee, and by each of the respondents, but not by Sawden :—

"To John Henry Sawden, executor of Susannah Candler Batchelor deceased.

"In consideration of you agreeing to release me the undersigned Herbert William Clarkson and accept us the undersigned Alfred Henry Murphy and Clementina Lucy Murphy" (the respondents) "as lessees for the unexpired residue of the term in the lease dated the 17th day of October 1913 and made between the said Susannah Candler Batchelor of the one part and Herbert William Clarkson of the other part relating to premises No. 17 Prince Street Bridlington we respectively agree as follows :—

"The said Herbert William Clarkson to surrender the said lease.

"The said Alfred Henry Murphy and C. L. Murphy to execute a new lease for the unexpired term of eight years and six months from the sixth October last on the same terms and conditions in all respects as the lease of October 17 1913 with the exception of the rent which until the cessation of the present hostilities shall be reduced to 82*l.* per year and during the remainder of the term at the rent reserved by the original lease."

The respondents took possession of the premises and had continued in possession ever since, but no such new lease as contemplated by the memorandum had ever been executed.

Sawden died in 1916, and in January, 1917, the appellant obtained probate of the will of Mrs. Batchelor.

On October 4, 1923, the respondents gave notice in writing to the appellant claiming to exercise an option for the purchase

of the premises upon the terms mentioned in the lease of October 17, 1913.

Thereupon the appellant took out an originating summons, asking for a declaration that upon the true construction of the lease of October 17, 1913, and the memorandum of November 17, 1915, the respondents were not entitled to call upon the appellant to sell the premises on the terms mentioned in the old option.

Tomlin J. made the declaration asked for in the summons.

The Court of Appeal by a majority (Warrington and Sargant L.JJ.; the Master of the Rolls dissenting) reversed the decision of the learned judge, and held that the respondents were entitled to the benefit of the option.

Luxmoore K.C. and *Hugh Bischoff* for the appellant. An option to purchase in a lease is an independent and collateral right, and has nothing to do with the relation of landlord and tenant. The memorandum was an agreement to constitute the relation of landlord and tenant between the executor of the lessor and the new lessees and nothing else, and it provides for the surrender of the old lease. That surrender puts an end to the option. One would expect to find in this agreement a stipulation that there should be a new option if that was what was intended. If the old option has gone by virtue of the surrender and a new option has to be granted an executor or trustee has no power to grant an option. There is here no express provision and no necessary implication that the option was to be included in the new lease: see Lord Ellenborough's observations in *Iggulden* v. *May* (1) quoted by Pollock M.R. in *Sherwood* v. *Tucker*. (2)

W. A. Greene K.C. and *Horace Freeman* for the respondents were not called upon.

VISCOUNT HALDANE. My Lords, in this case Warrington and Sargant L.JJ., constituting a majority of the Court of Appeal, notwithstanding the dissent of the Master of the Rolls, have reversed a decision of Tomlin J. On

(1) (1806) 7 East, 237, 241.
(2) [1924] 2 Ch. 440, 444.

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consideration I have come to the conclusion that Warrington and Sargant L.JJ. were right.

The question arises between the executors of a landlord and certain persons who claim to be entitled to the residue of a lease, under an agreement which contained terms which enable them, as they say, to take the benefit of an option to purchase the freehold. The question, put in other words, is whether, on the terms of a memorandum intended to provide for the grant of a new lease of the premises to the respondents, in substitution for the previous lease to another lessee, the respondents became entitled to the benefit of an option, similar to the one contained in the previous lease, for the purchase of the premises at a specified price.

Now the facts out of which the question arises are these. October 17, 1913, was the date of the original lease. A Mrs. Batchelor demised a shop and premises at Bridlington to Herbert William Clarkson for the term of $10\frac{1}{2}$ years, which was to commence, not from the date of the lease, but as from October 6 in the same year, and was to come to an end on April 5, 1924, at a rent of 100*l.* for the first year and afterwards at a yearly rent of 120*l.* The lease contained a provision for an option, to be exercised by the lessee during the term by giving three calendar months' notice in writing, for the purchase by the lessee of the inheritance, in fee simple free from incumbrances, of the demised premises at the price of 3000*l.*, together with interest thereon at the rate of 5 per cent. per annum from the expiration of the notice up to the time of completion.

My Lords, Mrs. Batchelor, the lessor, died in 1915, and by her will one John Henry Sawden and the appellant Hugh Batchelor were appointed her executors. John Henry Sawden alone proved, and power was reserved to the appellant to prove, and as John Henry Sawden has died the appellant has now proved. On November 17, 1915, a memorandum was signed by Clarkson, the original lessee, and by each of the respondents, but not by Sawden. That does not matter, because Sawden assented to the transaction. The terms of that memorandum were these: Clarkson asked Sawden,

the executor, to release him, and that he should be at liberty to surrender the lease, and the respondents, Alfred Henry Murphy and C. L. Murphy, were to execute a new lease for the unexpired term of eight years and six months from October 6. The wording is important. My Lords, this is one of the cases where the decision does not turn on abstract principles, because here they are too abstract for the facts, but upon the particular language used in the memorandum. We have got to construe the words and to say whether they gave to the respondents the benefit of the option to purchase the freehold or whether they did not. But there remained something personal to Clarkson, which, although it might have been assigned by him, was not assigned by him. The language to be construed is this: In consideration of you (Sawden) agreeing to release me (Clarkson) and to accept us (the respondents) "as lessees for the unexpired residue of the term in the lease dated the 17th day of October, 1913, and made between" Mrs. Batchelor and Clarkson. It is to be observed before I go further that what is referred to there as being "the lease" is the document and not the demise, because the demise took effect from an earlier date, the 6th, I think, of October; "the lease," therefore, prima facie means the document with what it contains. It goes on: You (Clarkson) to surrender the lease, the Murphys "to execute a new lease for the unexpired term of eight years and six months from the 6th October last"—that was the beginning of the term—"on the same terms and conditions in all respects as the lease of the 17th October, 1913, with the exception of the rent," which is to be reduced to 82*l.* per year "during the present hostilities," and is then to be the old rent for the remainder of the term.

Now, my Lords, as I said, the original lease contains an option to Clarkson to purchase, and to purchase for 3000*l.*, and be it noted that by a provision in that document, wherever Clarkson is named the document provides that Clarkson, his executors, administrators and assigns, are to be included by the word "Clarkson"; so that when the option to purchase is given to Clarkson it prima facie at all events

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means to include Clarkson's assigns. That being so, my Lords, the question is what is meant in the document of November, 1915, by "the terms and conditions" in the lease of October 17, 1913? They are to be "the same terms and conditions in all respects" as in the lease. My Lords, we are not dealing with a mere technical demise, we are dealing with a deed, the lease itself—a deed containing terms—and when you look at the substance of this transaction I quite agree that the option to purchase is a collateral right—it is not part of the term of the demise, it is a collateral right—but it is a collateral right which is included in the document, which in substance is transferred. I say in substance is transferred, because if you look at the document, Clarkson could have done what he did by an assignment of his lease or in the way he did—namely, by surrender and a new lease to be granted. There is no difference in substance between the two methods or the rights under them; it is only a different way of carrying out the same transaction, and I am of opinion that Clarkson, in substance, transferred his rights to the respondents.

My Lords, under these conditions I come to the conclusion with no great hesitation that the true view is that the respondents got the benefit of that option, and consequently that this appeal should be dismissed with costs.

LORD ATKINSON. My Lords, I concur. I think it is perfectly plain that the word "lease" where it occurs in this memorandum means the document, and with one exception it means the old document of October 17, 1913. We are then introduced to the new lease, and the new lease provides that it is to contain all the terms and conditions in all respects as the lease of October 17, 1913, with the exception of the rent and the duration of the term, and that they are to hold on during the remainder of the term at the rent reserved by the original lease. It is quite true that when there is a collateral agreement, it is not necessarily transferred by a transfer of the lease, but it is perfectly competent to the contracting parties if they are so inclined to use language

which will carry in a collateral agreement just as well as any stipulation springing from the relation of landlord and tenant. In my opinion when the parties used the words that the new lease is to contain all the terms and conditions in all respects as the lease of October 17, 1913, which, of course, means contained in the lease of October 17, 1913, they could use no words that are more expressive to convey the idea that the new lease is to be a replica of the old lease save and except in the two points of duration of the time and rent.

LORD WRENBURY. My Lords, but for the fact that two learned judges for whose opinion I entertain the greatest respect have formed and expressed an opinion favourable to the appellant's contention I should have thought there was no difficulty in this case.

On November 17, 1915, there was in existence a lease of October 17, 1913, demising a shop for a term of $10\frac{1}{2}$ years from October 6, 1913, with an option of purchase in the lessee upon giving certain notice, at the price of 3000*l*. That lease, therefore, was one which might run for $10\frac{1}{2}$ years or might not; whether it did or did not depended upon whether the lessee exercised his option of purchase. If, at the end of say three years, he exercised his option the $10\frac{1}{2}$ years would then determine; in other words the lease of October 17, 1913, was not for a period of $10\frac{1}{2}$ years certain, but for a period of $10\frac{1}{2}$ years determinable in an event. That being the state of things, there was executed on November 17, 1915, a document containing a passage which, to make my judgment intelligible, I think I ought to read at length: "The said Alfred Henry Murphy and C. L. Murphy" (these are the proposed new lessees) "to execute a new lease for the unexpired term of eight years and six months from October 6 last on the same terms and conditions in all respects as the lease of the 17th October, 1913," with an exception which it is not material to state.

Upon those words I have two observations to make. The new lease is to be for the unexpired term of eight years and six months, but that term was one which might, as I have

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stated (if the lease of 1913 had continued), have been determined in an event—namely, that of the exercise of the option. The second observation and the more material is this: The new lease is to be on the same terms and conditions in all respects as the lease of October 17, 1913. That can only mean on the same terms and conditions in all respects as "those contained in" the lease of October 17, 1913, or on the same terms and conditions in all respects as "those on which the lease of October 17, 1913, was granted." "Terms and conditions" cannot be the same as a lease. The language must bear one of the meanings I have suggested.

What were the terms and conditions on which the lease of October 17 was granted, or what were the terms and conditions contained in it? I do not care which form of words is taken. The "terms and conditions" on which it was granted included a term that in an event the term of years should come to an end and the lessee should become owner of the freehold. The "terms and conditions" contained in the lease included a term giving the lessee the option of purchase. It appears to me that here by express words the parties have said that what is to be taken over by the new lessees is a tenancy with all the terms and conditions of the old tenancy, including the option.

The only other point that deserves mention is this: It is said that the executor could not create a new option. I do not think he was creating a new option, he was continuing the existing option. This new lease was to be a document, expressed in the same words as the document which contained the option. I think the option was simply continued.

For these reasons I think this appeal fails and should be dismissed with costs.

LORD CARSON. My Lords, I concur that this appeal should be dismissed with costs.

LORD BLANESBURGH. My Lords, I am of the same opinion. In this memorandum of November 17, 1915, there are three references, two of them in terms and one, in effect,

equally direct, to the lease so described of October 17, 1913. In my opinion as a matter of construction each of these three references is a reference to the indenture or document of that date and not to the tenancy thereby constituted. That document, which contains also an option of purchase, is described in the memorandum as a "lease," but I think there can be no question that, even so described, the option contained in it is one of its terms, collateral to the letting though it be. When, therefore, you find, as you do, that the new "lease" is to be on the same terms and conditions in all respects as the "lease" of October 17, 1913—I supply the word "contains"—it seems to me to follow by necessity of reasoning that this new lease is amongst its terms to include the provision relating to the option of purchase, which is one of the "terms" of the document of October 17, 1913. If this view be taken as to the true construction of the memorandum in this regard, it follows inevitably that the order of the Court of Appeal was, as I think it was, quite right.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, Nov. 19, 1925.

Solicitors for the appellant: *Sharpe, Pritchard & Co., for West & Son, Bridlington.*

Solicitors for the respondents: *Collyer-Bristow & Co., for Stuart & Smith, Hull.*

[PRIVY COUNCIL.]

J. C.* 1925 July 21.

COMMONWEALTH TRUST, LIMITED . APPELLANTS;

AND

AKOTEY . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST.

Sale of Goods—Conversion—Title to Goods—Owner precluded from setting up Title—Railway Consignment Note—Bona fide Purchaser.

The respondent, a grower of cocoa in the Gold Coast Colony, there consigned by railway 1050 bags of cocoa to L., to whom he had previously sold cocoa. Before a difference as to the price had been settled, L. sold the cocoa to the appellants and handed the consignment notes to their agent, who reconsigned the cocoa to the appellants. The appellants bought in good faith and for the full price. The respondent sued the appellants in the Colony for damages for conversion:—

Held, that the respondent by his conduct was precluded from setting up his title against the appellants, and accordingly that the action failed.

Farquharson Bros. & Co. v. *King & Co.* [1902] A. C. 325 distinguished.

Judgment of the Supreme Court reversed.

APPEAL (No. 131 of 1924) from a judgment of the Full Court of the Gold Coast Colony (November 12, 1923) reversing a judgment of Beatty J.

The respondent brought an action in the Supreme Court of the Gold Coast Colony against the appellants and one Laing claiming damages for the conversion of 1050 bags of cocoa. The cocoa had been sold and delivered by the defendant Laing to the appellants in the circumstances stated in the judgment of the Judicial Committee. By the railway consignment notes the cocoa was to be delivered to Laing. The railway receipt book was signed by Lawson, the appellants' agent, upon his reconsigning the cocoa to the appellants.

The trial judge (Beatty J.) dismissed the action; he was of opinion that the property in the cocoa had passed to Laing before the sale to the appellants.

* *Present:* LORD ATKINSON, LORD SHAW, and LORD PARMOOR.

Upon appeal to the Full Court the decision was reversed. The learned judges held that the property had remained vested in the respondent. It was not necessary, they said, to decide whether the principle of the Factors Act applied in the Colony, because Laing was not a mercantile agent, and had dealt with the appellants as a principal. Judgment was given for 6375*l.* against both defendants.

No ordinance of the Colony was referred to in the judgments of the Courts below, or in the cases of the parties upon the appeal, dealing with the sale of goods.

1925. May 1, 4. *Clauson K.C.* and *J. Forster* for the appellants. The trial judge rightly held on the facts that the property in the cocoa had passed to Laing. But even if there was not a complete contract, and the property did not pass, the respondent is precluded from setting up his title. By his conduct he enabled Laing to deal with the cocoa as if he were the owner, or was authorized to sell it. The principle laid down in *Lickbarrow* v. *Mason* (1), and applied in *Henderson & Co.* v. *Williams* (2), applies in this case.

Hon. Geoffrey Lawrence K.C. for the respondent. There was not a complete contract between the respondent and Laing; the cocoa remained throughout the property of the respondent. The English law applicable to the case is codified in ss. 21 and 25 of the Sale of Goods Act, 1893; neither of those sections would help the appellants. The respondent did nothing to preclude him from setting up his title. The appellants had not agreed to buy, nor was the railway consignment note a document of title. The application of the principle laid down in *Lickbarrow* v. *Mason* (1) was expressly limited in *Farquharson Bros. & Co.* v. *King & Co.* (3) There was no evidence that Laing's possession of the consignment note induced the appellants to purchase the cocoa. The respondent is supported by *Cole* v. *North Western Bank* (4); *Heap* v. *Motorists' Advisory Agency* (5); and *Moakes* v.

(1) (1787) 2 T. R. 63, 70.
(2) [1895] 1 Q. B. 521.
(3) [1902] A. C. 325, 342.
(4) (1875) L. R. 10 C. P. 354.
(5) [1923] 1 K. B. 577.

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Nicolson. (1) If the appellants acquired under the common law a good title, there would have been no need to pass the Factors Act.

Clauson K.C. replied.

July 21. The judgment of their Lordships was delivered by

LORD SHAW. This is an appeal from a judgment of the Full Court of the Gold Coast Colony, reversing the judgment of the judge of first instance.

The action was brought by the respondent against the appellants and a co-defendant, named Laing, for damages for the conversion of 1050 bags of cocoa. This cocoa was consigned by respondent to Laing: the consignment notes were duly forwarded; Laing transferred these to the appellants, who, in entire good faith, took delivery of and paid Laing for the cocoa. The Full Court entered judgment for the respondent for the sum of 6375*l.* and costs. If the respondent is entitled to recover, this figure is not disputed. This means that the appellants are to pay a second time for the same cocoa on the alleged ground that the respondent cannot be charged with any responsibility for the sale by Laing, his consignee, and the receipt of payment by Laing.

The respondent is a grower of cocoa, and the appellants are a limited company carrying on business at Accra, including a business of general export and import. The co-defendant Laing is dead, but it is in evidence that he had on previous occasions in the year 1920 purchased cocoa on credit from the respondent, or the respondent's factor.

A question raised in the appeal is whether the cocoa about which the dispute has arisen had become the property of Laing, so as to place him in a position to transfer it with a good title to the appellants. The judge of first instance held that the property in the cocoa had passed from the respondent to Laing, and if it had so passed the appellants would be entitled to judgment. The Full Court held that the sale of the cocoa had not been completed between Laing and the respondent.

(1) (1865) 19 C. B. (N. S.) 290.

A material question in the case is whether a certain letter of April 30, 1920, is genuine. The judge of first instance was not satisfied as to the genuineness of this letter, but the Full Court held that without deciding whether it was genuine, or not, the case could be decided apart from that. The Board is of opinion that the alleged letter cannot be relied upon as a genuine letter.

The other correspondence is as follows: the first letter of April 28 states that the respondent has that day "consigned 492 bags, viz.: 242 in waggon No. 1274, and 250 bags in waggon No. 1213," and the letter adds this important sentence, "And consignment note of it I have attached to this letter and I am sure you will get it safely." This letter covers part of the cocoa in question in this case. The letter ends: "Expect me on the coming Monday, and I will come and see you."

A second letter was written on April 29 stating that a further consignment had been made, and adding: "Consignment note of it enclosed with my best compliments." The cocoa referred to in these two letters covers 756 bags out of the 1050 bags included in the writ of summons. A further letter was written on April 29 stating that the respondent had shipped 250 bags of cocoa, but these bags are not part of the cocoa in question. It includes, however, the sentence, "Find more money (cash) and I will come on Monday, May 3, 1920, to receive it."

Laing sold the cocoa to Lawson, the transport manager of the appellants, and handed him the consignment notes. Lawson took delivery by reconsigning the bags in which the cocoa was packed to the railway sidings of the appellants. It is not disputed that the actings of the appellants were in good faith, nor that the purchase was made in ordinary course of business and for full value.

It turns out that although Laing had the goods consigned to him, he and the respondent had a difference as to price, the respondent wishing Laing to increase the figure of 50*s.* a ton which Laing had named.

On May 1 the respondent came down to Accra and saw

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Laing, who stated that he was prepared to pay the respondent 50*s.* a load, but this the respondent refused to accept. Their Lordships incline to agree with the decision of the Full Court that the price of 50*s.* had not been accepted by the respondent when he forwarded the consignment note to Laing, and that consequently no contract of sale had been completed at the material date.

It was further argued before their Lordships that although the property in the cocoa had not passed from the respondent, yet that the respondent had so acted as to estop him from setting up his title in answer to the claim of the appellants. Reliance was placed on the well-known statement of Ashhurst J. in *Lickbarrow* v. *Mason* (1), " that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Their Lordships are clearly of opinion that the present is a plain case for the application of that principle. There is no kind of specialty in this case such as occurred in *Farquharson Bros. & Co.* v. *King & Co.* (2), the parallel to which would be that the goods were delivered to Laing by the fraudulent act of respondent's agent : the goods were in fact delivered over to Laing by the direct act of the respondent himself.

To permit goods to go into the possession of another, with all the insignia of possession thereof and of apparent title, and to leave it open to go behind that possession so given and accompanied, and upset a purchase of the goods made for full value and in good faith, would bring confusion into mercantile transactions, and would be inconsistent with law and with the principles so frequently affirmed, following *Lickbarrow* v. *Mason.* (1)

Their Lordships will humbly advise His Majesty that the appeal should be allowed, the judgment of the Full Court set aside with costs, and the judgment of Beatty J. restored. The respondent will pay the costs of the appeal.

Solicitor for appellants : *Linklaters & Paines.*
Solicitors for respondent : *Denton, Hall & Burgin.*

(1) 2 T. R. 63, 70. (2) [1902] A. C. 325.

[PRIVY COUNCIL.]

NANKA-BRUCE . . . . . APPELLANT; J. C.* 1925 Nov. 19.

AND

COMMONWEALTH TRUST, LIMITED . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST.

Gold Coast—Sale of Goods—Passing of Property—Checking Weight—Absence of Condition Precedent—Purchase in good Faith.

The appellant arranged to consign cocoa to one L. by rail at 59*s.* per load of 60 lbs. L. was to resell the cocoa to merchants and to transfer to them the railway consignment notes; the merchants were to check the weights, and L. was to pay according to the weights so checked. The appellant consigned 160 bags of cocoa to L., and he sold it to the respondents, transferring to them the consignment note. The respondents bought and took delivery in good faith, and credited L. with the purchase price against a large debt due to them from him. The appellant brought an action in the Supreme Court of the Gold Coast to recover from the respondents damages for conversion of the cocoa:—

Held, that the checking of the weights by the merchant was not a condition precedent to the passing of the property to L., that the respondents having bought in good faith obtained a good title against the appellant, and, accordingly, that the action failed.

Cundy v. *Lindsay* (1878) 3 App. Cas. 459, 463 applied.

Judgment of the Supreme Court affirmed.

APPEAL (No. 127 of 1924) from a judgment of the Full Court of the Gold Coast Colony (November 23, 1923) affirming a judgment of Beatty J.

The action was brought by the appellant in the Supreme Court of the Gold Coast Colony, against the respondents and one Laing, to recover the value of 160 bags of cocoa or alternatively damages for their conversion.

The facts appear from the judgment of the Judicial Committee.

The trial judge dismissed the action, and his decision was affirmed by the Full Court.

1925. May 4, 5. *Hon. Geoffrey Lawrence K.C.* for the appellant.

Clauson K.C. and *J. Forster* for the respondents.

* *Present:* LORD ATKINSON, LORD SHAW, and LORD PARMOOR.

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July 21. The judgment of their Lordships was delivered by

LORD SHAW. This is an appeal from the judgment of the Full Court of the Gold Coast Colony affirming a judgment of Beatty J. without a jury.

The appellant is a planter and shipper of cocoa, carrying on business at Accra. The respondents carry on business at Accra as general exporters and importers.

One, Laing (the co-defendant with the respondents in the action), was an editor of a newspaper in Accra and a buyer and seller of cocoa. He had previously made purchases of cocoa from the appellant.

The claim of the appellant against the respondents is for damages for conversion of 160 bags of cocoa. The history of this cocoa, so far as is material to the present case, and stated neutrally, is as follows: The appellant entered into a general arrangement with Laing, under which Laing was to receive cocoa from the appellant at the price of 59*s.* per load of 60 lbs. It was recognized that Laing would resell the cocoa to other merchants, and that when these other merchants took delivery by a transfer of the consignment notes the goods would be weighed up at their premises and the weights tested there. That operation being completed, the amount payable by Laing on the contract made with the appellant was, of course, ascertained.

On April 24, 1920, the 160 bags of cocoa were despatched by rail by the appellant to Accra under a consignment note made out in favour of Laing. Laing then acted with the goods thus: He sold them to the respondents, and handed to the respondents' representatives the railway consignment note. The respondents took delivery and, against a large debt due to them from Laing, credited him with the price at which they had purchased the goods. Laing's conduct seems unquestionably to have been dishonest conduct. Both Courts have, however, found that the conduct of the respondents was quite honest, and that they purchased the goods for value and without any notice of any objection to, or defect in, the title of Laing, or the contract under which he had acquired the goods. Both Courts have concurrently

found that Laing purchased the cocoa from the appellant. The appellant attacked this finding as erroneous in law, alleging that the weighing up of the goods must be treated as having been a condition precedent to an operative sale.

Their Lordships agree that the provision as to the weight of the goods being tested was not a condition precedent to a sale. The goods were transferred, their price was fixed, and the testing was merely to see whether the goods fitted the weights as represented, but this testing was not suspensive of the contract of sale or a condition precedent to it. To effect such suspension or impose such a condition would require a clear contract between vendor and vendee to that effect. In this case there was no contract whatsoever to carry into effect the weighing, which was simply a means to satisfy the purchaser that he had what he had bargained for and that the full price claimed per the contract was therefore due.

The law upon this branch of the contract of sale is thus expressed by Lord Cairns L.C. in *Cundy* v. *Lindsay* (1): "Now, with regard to the title to personal property, the settled and well known rules of law may, I take it, be thus expressed: by the law of our country the purchaser of a chattel takes the chattel as a general rule subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt, he obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it, by a de facto contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that

(1) 3 App. Cas. 459, 463, 464.

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contract, which would enable the original owner of the goods to reduce it, and to set it aside, because these circumstances so enabling the original owner of the goods, or of the chattel, to reduce the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced."

Applying that law their Lordships find no difficulty in affirming that these goods were de facto sold to Laing by the appellant, and that so far as the respondents were concerned they were honestly and for value bought by them from Laing. Suppose it to be the case that the appellant, defrauded by Laing, to whom he had sold the goods, could have treated the transaction as voidable on that account and sued Laing for remission accordingly, that cannot in law form a ground of impeachment as against buyers in good faith and for value from the person, like Laing, thus vested in the goods by a de facto contract.

This is an end of the case. Another point might have been raised—namely, whether the respondents should not succeed on the ground that Laing, whether vendee or not, was put in possession of the goods of the appellant and in the position of selling them to others, in short on the principle just applied by this Board in the case of *Commonwealth Trust* v. *Akotey*. (1) But such an argument need not be entered upon.

Their Lordships are of opinion that the conclusion arrived at in the careful judgment of the Full Court was right. They will humbly advise His Majesty that the appeal should be disallowed with costs.

Solicitors for appellant: *Denton, Hall & Burgin.*
Solicitors for respondents: *Linklaters & Paines.*

(1) Ante, p. 72.

[PRIVY COUNCIL.]

CITY OF TORONTO CORPORATION . APPELLANTS; J. C.*
1925
July 28.

AND

TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS OF TORONTO } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Ontario)—Separate School—School Building—Municipal By-law—Legislative Powers—Denominational School—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *s.* 93—*Separate Schools Act* (*R.S. Ont.*, 1914, *c.* 270), *s.* 45—*Municipal Amendment Act* (11 *Geo.* 5, *c.* 63), *s.* 399A.

A by-law passed by a City Council under s. 399A of the Municipal Act of Ontario, prohibiting in a certain district the erection of buildings except for use as private residences, is enforceable in respect of a school erected by the trustees of a separate school under their statutory powers. The exemption in proviso (*a*) to s. 399A does not apply to a building which, at the time when the by-law is passed, is not in course of erection, and of which the plans have not been approved by the city architect. The British North America Act, 1867, s. 93, does not prevent the provisions of the Municipal Act with reference to building, and other matters relating to the health and convenience of the population, from applying to denominational schools.

Judgment of the Supreme Court reversed.

APPEAL (No. 102 of 1924) by special leave from a judgment of the Supreme Court of Canada (May 22, 1924) reversing two judgments of the Appellate Division of the Supreme Court of Ontario (June 11, 1923).

The question for determination in the appeal was whether a by-law passed by the City Council of Toronto restricting the use of land in a certain area to buildings for residential purposes, was enforceable in respect of school buildings erected by the respondent trustees under their statutory powers, upon land which, under these powers, they had purchased for the erection of schools.

The facts appear from the judgment of the Judicial Committee.

The judgment of the Supreme Court of Canada (Idington J.

* *Present:* VISCOUNT CAVE, VISCOUNT HALDANE, LORD SHAW, LORD CARSON, and LORD BLANESBURGH.

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dissenting), whereby it was held that the by-law was not enforceable in respect of the respondents' school buildings, is reported at [1924] S. C. R. 368.

1925. July 2, 3. *Geary K.C.* and *Hon. Geoffrey Lawrence K.C.* for the appellants.

Tilley K.C. and *J. E. Day* for the respondents.

July 28. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. This appeal raises some important questions as to the relative rights of a School Board acting under the Separate Schools Act of Ontario and a City Council acting under the Municipal Act of that Province. By virtue of the Separate Schools Act, the Board of Trustees of the Roman Catholic Separate Schools for the city of Toronto (who will be referred to in this judgment as the "School Board") have power to acquire or rent school sites and to build and carry on schools. By virtue of the Municipal Act, the Corporation of the city of Toronto is empowered to prohibit by by-law the use of land or the erection or use of buildings within any defined area for any purpose other than that of a private residence. The question is whether, in the circumstances of this case, a by-law made by the Corporation under the latter statute is enforceable in respect of a site purchased by the School Board for school purposes.

In the year 1921 the School Board, having been evicted for the purpose of a street improvement from their school in St. Vincent Street, purchased two adjoining houses with gardens, being Nos. 14 and 18 Prince Arthur Avenue, Toronto, with the object of transferring their scholars to a new school to be erected on that site. No. 14 Prince Arthur Avenue was vacant, and the School Board obtained possession of that property on August 19, 1921; but No. 18 was let to tenants who were subject to a two months' notice to quit, and actual possession of that property was not obtained until the month of April in the following year. Immediately on obtaining possession of No. 14, the School Board, without depositing plans as required by the municipal by-laws then in force,

made some structural alterations in the building with a view to adapting it for temporary use as a school; and subsequently —namely, on September 6 and 9, they deposited plans for these temporary alterations. Prince Arthur Avenue is a residential street, and on September 14 the residents in that street, having heard of the proposal to open a school there, appealed to the Board of Control to intervene; and that Board referred to the City Council the question of making a by-law for preserving the residential character of the street, and instructed the city architect to withhold his approval of the plans deposited by the School Board pending the consideration of this question by the Council. The School Board thereupon acted with great promptness. On September 15 their architect deposited with the city architect plans for the erection of a school extending over the site of Nos. 14 and 18 Prince Arthur Avenue, and on the same day the School Board applied to the Court for a mandamus directing the city architect to consider these plans and to grant a permit both for the temporary alterations and for the erection of a school building upon the entire site. They also opened a school in No. 14 as altered, and by agreement with the tenants of No. 18 obtained possession of a part of the garden at the rear of that house, and caused it to be used as a playground for the scholars.

On September 26 the City Council met and under the powers conferred upon them by s. 399A of the Municipal Act, passed a by-law (No. 8834) in the following form:— "I. No person shall use the land fronting or abutting on either side of Prince Arthur Avenue, between Avenue Road and Huron Street, or erect or use any buildings on the said land for any other purpose than that of a detached private residence. II. Any person convicted of a breach of any of the provisions of this by-law shall forfeit and pay, at the discretion of the convicting magistrate, a penalty not exceeding (exclusive of costs) the sum of $50 for each offence. III. This by-law shall take effect upon, from and after receiving the approval of the Ontario Railway and Municipal Board."

This by-law was approved, after arguments on both sides,

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by the Railway and Municipal Board. The application for a mandamus, having been adjourned in the meantime, was thereupon dismissed by Middleton J.; and an appeal to a Divisional Court against this dismissal was adjourned by that Court sine die to enable the School Board to take proceedings to get the by-law quashed.

Accordingly, on March 10, 1922, the School Board brought an action against the City Council and their architect, claiming to have the by-law declared invalid or inapplicable and consequential relief. On April 19, 1922, the City Council commenced an action against the School Board, claiming an injunction to restrain that Board from using in breach of by-law No. 8834 the part of its lands not used for school purposes prior to the passing of the by-law, being the front part of No. 18 Prince Arthur Avenue. The two actions were consolidated, and were tried by Middleton J., who dismissed the action brought by the School Board and granted an injunction as asked by the City Council. An appeal to the Appellate Division of the Supreme Court of Ontario against this judgment, and against the refusal of Middleton J. and the Divisional Court to grant a mandamus, was dismissed. The School Board applied for leave to appeal against the decision of the Appellate Division to the Supreme Court of Canada, and such leave was granted on an undertaking by the School Board to abandon as a ground of appeal any contention that the form of the by-law in question in the action, if it was competently enacted, did not correctly follow the statute pursuant to which it was passed, and also any contention that the Municipal Council in passing the by-law acted in bad faith.

On the hearing of the appeal to the Supreme Court of Canada, that Court (Idington J. dissenting) allowed the appeal and made an order that the city architect should consider the application of the School Board for a permit to erect a school building upon the premises Nos. 14 and 18 Prince Arthur Avenue, and should grant a permit for the erection of that building in accordance with the plans and specifications left with the city architect by the Board or as the same might

be amended in compliance with the by-laws of the city of Toronto respecting buildings. The reasons for this decision are to be found in the judgment delivered by Duff J. on behalf of the majority of the Court, from which it appears that the decision was based mainly upon the proviso marked (*a*) contained in s. 399A of the Municipal Act of 1921. That section, after enacting that by-laws might be passed by the councils of cities and other municipalities for prohibiting the use of land or the erection or use of buildings within any defined area or areas abutting on any defined highway or part of a highway for any other purpose than that of a detached private residence, provided as follows: "(*a*) No by-law passed under this section shall apply to any land or building which on the day the by-law is passed is erected or used for any purpose prohibited by the by-law so long as it continues to be used for that purpose, nor shall it apply to any building in course of erection or to any building the plans for which have been approved by the city architect prior to the date of the passing of the by-law, so long as when erected it is used for the purpose for which it was erected."

After referring to this proviso, the learned judge said (1): "The right of the owner of land, therefore, to make use of it, subject to the existing by-laws, in the erection of such buildings upon it as he thinks proper to erect, is preserved inviolate down to the point of time when the restrictive by-law is actually passed; and thereafter, in the limited degree prescribed, in the special cases mentioned. That right, as Middleton J. held in the case already cited, includes the right to receive the necessary permit for the erection of a building proposed to be erected in conformity with the law in force for the time being. It is quite manifest that in the result, if effect be given to the judgments of the Ontario Courts, this right is denied the appellants. The by-law producing this result cannot, in view of the circumstances, in our opinion, be sustained as a valid exercise of the authority given by the statute. The protection of the existing status is a substantive element in the purpose of the enactment. The

(1) [1924] S. C. R. 374.

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by-law, passed in the circumstances in which it was passed, necessarily had the effect (and it was so designed) of depriving the appellants of the benefit of a status of which the statute guaranteed the protection. That, in our opinion, is not according to the tenor of the authority created."

The learned judge concluded by expressing a hope that, with the co-operation of all parties concerned, it might be possible to make other arrangements which would relieve the residents of the street of the very grave detriment and hardship arising from the presence of the school, the existence of which was not disputed.

With the greatest respect for the opinion of the learned judges composing the majority of the Supreme Court, their Lordships are unable to concur in this reasoning. No doubt it is true that, unless and until a by-law restricting the building upon any land is passed, the owner of the land has a right, subject to the existing by-laws, to erect upon it such buildings as he may think proper. But the whole object and purpose of s. 399A is to empower the city authority, acting in good faith, to put restrictions upon that right with a view to the protection of neighbouring owners against that "grave detriment and hardship" to which the learned judge referred; and the "status" or proprietary right of the owner is limited by the powers of the city to be exercised for the protection of his neighbours. If the reasoning of the learned judge is to be taken literally, then in every case the "status" of the building owner is to prevail, and that whether he has or has not deposited plans with a view to building upon his land; and even if the sentences quoted refer only to a case where plans have been deposited before the by-law is passed, they yet go beyond the express terms of the statute. The operation of proviso (*a*) is confined to cases where at the date of the passing of a by-law either (1.) a building is erected or used for a purpose prohibited by the by-law, or (2.) a building is in course of erection, or (3.) the plans for a building have been approved by the city architect; and it would appear to their Lordships to be a necessary inference from the express terms of the proviso that where plans have been deposited but not

yet approved, and the building is not in course of erection, the operation of the by-law is not excluded. There may be a prima facie right to have the deposited plans approved; but if so, that right is negatived by the passing and approval of the by-law. It was suggested that the by-law was defective on the ground that the limitations contained in proviso (*a*) to the section should have been but were not embodied in the by-law itself; but having regard to the undertaking given by the respondents to abandon any contention that the form of the by-law did not correctly follow the statute, this argument was not open to the respondents on this appeal, and their Lordships accordingly express no opinion upon it.

Counsel for the defendants raised an alternative contention which is not dealt with by the judgments in the Supreme Court—namely, that the power of the city under s. 399A of the Municipal Act to prohibit the use of any land or the erection or use of any building for any purpose other than that of a private residence, cannot prevent a School Board from erecting or carrying on a school on a site acquired by them for that purpose. Attention was called to the power given to public school trustees by the Common Schools Act of Upper Canada of 1859 (s. 79) to determine the site of schools—a power which was extended by an Act of 1863 (26 Vict. c. 5, s. 7) to trustees of separate schools—and also to s. 45 of the Separate Schools Act (R.S. Ont., 1914, c. 270), which empowers a Separate School Board to acquire or rent school sites, build school-houses and exercise other powers; and it was argued that, according to the well-known rule "generalia specialibus non derogant," the general provisions of the Municipal Act must yield to the special powers given to Separate School trustees. Their Lordships do not accede to this argument. If the two sets of statutes contained provisions which were not reconcilable with one another, it would be necessary to consider which should prevail; but there is no reason why the powers of the School Board should not be exercised subject, not only in relation to the construction of the buildings to be erected upon a site, but also in relation

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to the suitability of the site having regard to the public convenience, to the control of the municipal authority. School Boards are public bodies and have rights given to them for educational purposes; but those rights were not intended to over-ride the powers given to municipalities for the protection of the community as a whole.

It was further argued that the power given by s. 5 of the Schools Sites Act (R.S. Ont., 1914, c. 277) to the trustees of a public school to expropriate land for a school site was vested by virtue of s. 45 (m) of the Separate Schools Act in the respondents, and that, as they could have taken Nos. 14 and 18 Prince Arthur Avenue compulsorily for a school site, they should not be prevented from using those premises for that purpose. In their Lordships' opinion the respondents had no such compulsory powers until they were conferred upon them by the School Sites Amendment Act, 1922; and that Act contained a proviso which prevented it from applying to or affecting any action or proceeding then pending. This argument, therefore, also falls to the ground.

A further argument was founded on s. 93 of the British North America Act, 1867, which enacts that a Provincial Legislature may exclusively make laws in relation to education, but provides (among other things) that "nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law in the Province at the Union"; and reference was made to the case of *Ottawa Separate Schools Trustees* v. *Ottawa Corporation*. (1) In their Lordships' opinion this provision has no application to the present case. It is a restriction upon the power of the Province to make laws in relation to education, but does not prevent the provisions of the Municipal Act with reference to building, and other matters relating to the health and convenience of the population, from applying to denominational schools as well as to other buildings.

One further point requires to be noticed. The order which was made by Middleton J. and which their Lordships are

(1) [1917] A. C. 76.

asked by the appellants to restore, while saving (in accordance with proviso (*a*) to s. 399A of the Municipal Act) the right of the respondents to use for school purposes those parts of the premises purchased by them which were so used at the date of the passing of the by-law, contains words which appear to negative any right in the respondents to erect a new school on those parts of the premises at a future time; and it was urged on behalf of the respondents that in this respect the order went too far, and that they should be left free to erect upon those premises such school buildings as they may think fit. In their Lordships' opinion this is not their right. The reasonable repair and improvement of the existing school buildings, if in accordance with the by-laws relating to buildings, could hardly meet with objection; but the erection of a new building to be used for the prohibited purpose would not fall within the saving of proviso (*a*) of s. 399A, which is confined to "any land or building which on the day the by-law is passed is erected or used for any purpose prohibited by the by-law so long as it continues to be used for that purpose."

For these reasons their Lordships are of opinion that this appeal should be allowed, and that the order of the Supreme Court of Canada should be set aside and the order of the Appellate Division of the Supreme Court of Ontario restored, and they will humbly advise His Majesty accordingly. The appellants will have their costs in the Supreme Court, but, in accordance with their undertaking, they will pay the costs of this appeal.

Solicitors for appellants: *Freshfields, Leese & Munns.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.* 1925 Oct. 22.

PALATINE INSURANCE COMPANY, LIMITED . . . . . } Appellants;

AND

GREGORY . . . . . Respondent.

[AND CONNECTED APPEALS.]

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Canada (New Brunswick)—Insurance (Fire)—Variation of statutory Conditions—Insurance of Timber—Clear Space Clause—Fire Insurance Policies Act, 1913 (3 *Geo.* 5, *c.* 26, *New Bruns.*), *ss.* 4, 5.

Timber belonging to the respondent was insured by the appellants against fire while in a timber yard. The policy contained a clause: "Warranted by the assured that a continuous clear space of 50 feet shall hereafter be maintained between the timber hereby insured and any sawmill . . . ., and 300 feet between any open refuse-burner." This clause was not one of the conditions in policies provided by the New Brunswick Fire Insurance Act, 1913, and did not appear in the distinctive manner which that Act requires for any variation from those conditions. The timber was set on fire by a spark from an open refuse-burner which was only 80 feet from the timber:—

Held, that the clause was inoperative, as it was a condition, not a description or limitation of the timber covered by the policy, and was not expressed in the required manner.

Mackay Co. v. *British America Assurance Co.* [1923] S. C. R. 335 and *Fidelity-Phœnix Fire Insurance Co. of New York* v. *McPherson* [1924] S. C. R. 666 approved.

Judgment of the Supreme Court affirmed.

Appeal (No. 160 of 1924) from a judgment of the Appeal Division of the Supreme Court of New Brunswick (April 17, 1924) affirming a judgment of the King's Bench Division of that Court.

The respondent brought an action against the appellants upon a policy of insurance against fire in respect of timber while in a timber yard. Among other defences the appellants relied on a clause in the policy therein described as the "clear space clause No. 2."

* *Present:* Viscount Cave L.C., Viscount Haldane, Lord Carson, and Mr. Justice Duff.

The trial judge held that the clause was a condition, and that it was invalid, since it was a variation of the statutory conditions provided by the New Brunswick Fire Insurance Policies Act, 1913, and was not printed in the manner required by that Act for any variation from those conditions. Judgment was entered for the plaintiff-respondent.

The Appeal Division affirmed the judgment.

The facts, and the material provisions of the Act, appear from the judgment of the Judicial Committee.

1925. June 20, 21. *Clauson K.C.*, *F. R. Taylor K.C.*, *Hon. Geoffrey Lawrence K.C.* and *Fairbrother* for the appellants relied upon the contention stated in the judgment.

Claughton Scott K.C. and *Adrian Gilbert* for the respondent were not called upon.

Oct. 22. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. The question to be determined on these appeals is, what effect is to be given in the circumstances of this case to certain sections of the New Brunswick Fire Insurance Policies Act. By that Act fire policies are to be deemed to be subject to certain statutory conditions, and by ss. 4 and 5 of the Act it is provided as follows :—

" 4. If the insurer desires to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added on the instrument of contract containing the printed statutory conditions words to the effect set out in the second schedule, printed in conspicuous type, and in ink of a different colour, and with the heading ' variations in conditions.'

" 5. No such variation, addition or omission shall, unless the same is distinctly indicated and set forth in the manner hereinbefore mentioned or to the like effect, be valid and binding on the assured ; and no questions shall be considered as to whether any such variation, addition, or omission is, under the circumstances, just and reasonable ; but on the contrary the policy shall, as against the insurer, be subject to the statutory conditions only, unless the variations, additions or omissions are distinctly indicated and set forth in the manner or to the effect aforesaid. . . . ."

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By each of the policies with which these proceedings are concerned certain timber and wood goods of the present respondent were insured by the appellants against fire in a specified sum, but only while located in a certain timber yard at Ferry's Cove, St. John County, New Brunswick. Each policy was expressed to be "subject to the 50-foot clear space clause and 100 per cent. co-insurance clause attached." The clear space clause so referred to and attached to each policy was in the following form:—

"NEW BRUNSWICK BOARD OF FIRE UNDERWRITERS.
CLEAR SPACE CLAUSE NO. 2.
For Lumber in the Vicinity of Mills.

"Warranted by the assured that a continuous clear space of 50 feet shall hereafter be maintained between the property hereby insured and any sawmill or woodworking establishment, and the said space shall not be used for the piling of lumber thereon for temporary purposes, tramways upon which lumber is not piled alone being excepted, and 300 feet between any open refuse-burner [or any standing wood brush or forest]. The space clause does not admit of any erection whatever (except tramways) within the space limits, but this shall not be construed to prohibit loading or unloading within, or transportation of lumber or timber products across such clear space."

The words "or any standing wood brush or forest" were struck out in some of the policies, but this is for present purposes immaterial. It is admitted that the clear space clause was not indicated and set forth in manner required by s. 4 of the Act—that is to say, it was not introduced by the heading prescribed by that section, nor was it printed in conspicuous type or in ink of a different colour.

There was at the date of the policies an open refuse-burner distant not 300 feet, but 80 feet only, from the goods insured, and this burner remained within that distance throughout the currency of the policies; and while the policies were still current sparks from this burner reached and set fire to the insured property, which was wholly destroyed. A claim

having been made under each policy, the insurers pleaded (among other defences) that the clear space clause had not been complied with, and that the policies were void on that ground. To this it was replied that the clear space clause was a new condition within the meaning of the Act, and not having been indicated and set forth as the Act requires, was not binding on the insured. The question so raised was decided in favour of the insured (the present respondent) by the King's Bench Division of the Supreme Court of New Brunswick and by the Appeal Division of that Court; and it is against this decision that the present appeals are brought. It should be added that other defences were also raised and decided in favour of the respondent; but these are not now insisted upon by the appellants, and they need not be further referred to.

The argument urged on behalf of the appellants was that the clear space clause was not a condition of the policy, but was only a description and limitation of the risk covered. The effect of the clause, it was said, was that the timber if and while distant 300 feet from an open refuse-burner was insured, but if within that distance was not covered by the policy at all; and in support of this view reference was made to the decision of this Board in *Curtis's & Harvey (Canada)* v. *North British & Mercantile Insurance Co.* (1) In their Lordships' opinion the clear space clause was not a description of the goods or of the risk insured, but was in the true sense a condition of the insurance. Each policy is expressed to be "subject to" the clause, and the clause is introduced by the word "warranted," which is commonly used in relation to a condition in a policy. Further, the clause requires that the clear space prescribed shall be "maintained"—that is to say, maintained throughout the currency of the policy; and the effect of this stipulation is to impose on the insured an obligation which continues and is to be observed throughout the currency of the policy. As to the authorities, *Curtis's & Harvey's* case (1), where it was held that having regard to the terms of the insurance it did not extend to damage by

(1) [1921] 1 A. C. 303.

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explosion caused by fire, has no application; and the same may be said of *London Assurance Corporation* v. *Great Northern Transit Co.* (1) The present case is not distinguishable from *Mackay Co.* v. *British America Assurance Co.* (2) and *Fidelity-Phœnix Fire Insurance Co. of New York* v. *McPherson* (3), with which their Lordships agree.

For these reasons their Lordships are of opinion that the clear space clause was void, and they will humbly advise His Majesty that these appeals fail and should be dismissed with costs.

Solicitors for appellants: *Linklaters & Paines.*
Solicitors for respondent: *William A. Crump & Son.*

[PRIVY COUNCIL.]

J. C.* 1925 *Nov.* 10.

BROKEN HILL PROPRIETARY COMPANY, LIMITED . . . . . } APPELLANTS;

AND

MUNICIPAL COUNCIL OF BROKEN HILL . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales—Rating—Mine—Unimproved Capital Value—Average annual Value of Ore won—Res judicata—Decision as to Valuation for previous Year—Local Government Act, 1919 (*No.* 41 *of* 1919, *N. S. W.*), *s.* 153, *sub-s.* 3.

The Local Government Act, 1919, of New South Wales, provides by s. 153, sub-s. 3, that the unimproved capital value of a mine for rating purposes, when ascertained by valuation based on output, shall be a sum equal to twenty per centum of the average annual saleable value of the ore won during the three years next preceding the year in which the valuation is made, or during such part of that time as the mine has been worked.

The appellants' mine was worked during the years 1919, 1920, and

(1) (1899) 29 Can. S. C. R. 577. (2) [1923] S. C. R. 335.
(3) [1924] S. C. R. 666.

* *Present:* VISCOUNT CAVE L.C., LORD CARSON, LORD BLANESBURGH, and MR. JUSTICE DUFF.

1921 during 205 days only owing to strikes and the low price obtainable for ore, though maintenance was continued during the whole period :—

Held, that the average annual value was to be ascertained by dividing the value of the output during the three years by three, not by multiplying it by 205 and dividing it by 365.

Held, further, that the question was not res judicata by a decision of the High Court of Australia between the parties as to the valuation for a previous year.

Broken Hill Municipal Council v. *Broken Hill Proprietary Co.* (1922) 30 C. L. R. 400 disapproved.

North Broken Hill, Ld. v. *Broken Hill Municipal Council* (1921) 21 S. R. (N. S. W.) 758 approved.

Judgment of the Supreme Court reversed.

APPEAL (No. 147 of 1924) from a judgment of the Supreme Court of New South Wales (June 3, 1923) on a special case stated by the judge of the Land and Valuation Court.

The question for determination in the appeal was as to the correct method of ascertaining, upon the assessment for 1923, the unimproved capital value of the appellants' mine under s. 153, sub-s. 3, of the Local Government Act, 1919, of New South Wales.

The facts and terms of the sub-section appear from the judgment of the Judicial Committee.

The Supreme Court of New South Wales affirmed the decision of the judge of the Land and Valuation Court who had adopted the method contended for by the respondent municipal council. The learned judges considered themselves bound by the decision of the High Court of Australia in *Broken Hill Municipal Council* v. *Broken Hill Proprietary Co.* (1)

1923. July 28, 30. *Clauson K.C.* and *Hon. Geoffrey Lawrence K.C.* for the appellants. Upon the true construction of s. 153, sub-s. 3, of the Local Government Act, 1919, the output during the three years should be divided by three. An annual average cannot be arrived at except by taking an average of years. The method adopted by the High Court of Australia in the decision as to the previous assessment involved taking a hypothetical output instead of the actual output. The view of the Supreme Court in *North Broken Hill, Ld.* v. *Broken Hill Municipal Council* (2) was correct.

(1) 30 C. L. R. 400. (2) 21 S. R. (N. S. W.) 758.

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Latter K.C. and *Vernon* for the respondents. Upon the true construction of the Act the method adopted by the majority in the High Court of Australia is correct. Further, the present question is res judicata between the parties having regard to the decision of the High Court between the same parties: *Duchess of Kingston's Case* (1); *In re Bank of Hindustan, China, and Japan* (2); *Peareth* v. *Marriott* (3); *Badar Bee* v. *Habib Merican Noordin.* (4)

Clauson K.C. in reply. The decision of the High Court did not render the present question res judicata. There can be no estoppel as to the construction of an Act. Further, the decision of the High Court related to the assessment for a previous year, which was not eadem questio.

Nov. 10. The judgment of their Lordships was delivered by

LORD CARSON. The appellants are the occupiers of a mine of lead and silver within the municipality of Broken Hill. The respondents are the rating authority of the municipality. The question in this appeal arises on the construction of the Local Government Act, 1919, New South Wales (No. 41 of 1919), and relates to the ascertainment of the "unimproved capital value" of the mine of the appellants for rating purposes under s. 153, sub-s. 3 (identical with cl. 12 of Sch. 3 to the said Act).

The said sub-section reads as follows: "In the case of a mine other than a coal or shale mine the unimproved capital value thereof ascertained by valuation based on output shall be a sum equal to twenty per centum of the average annual saleable value to the mine owner of the ore or mineral won from the mine or of the product derived from such ore or mineral during the three years next preceding the year in which the valuation is made, or during such part of that time as the mine has been worked, such value to be determined as such ore, mineral or product leaves the area within which such mine is situate."

The Act of 1919 repealed and replaced the Local

(1) (1776) 2 Sm. L. C., 12th ed., 754.
(2) (1873) L. R. 9 Ch. 1, 25.
(3) (1882) 22 Ch. D. 182.
(4) [1909] A. C. 615.

Government Act, New South Wales, of 1906 (No. 56 of 1906). The provisions of s. 153 (already quoted) and cl. 12 of the schedule of the Act are in substitution for those of s. 132 of the Act of 1906 and are substantially to the same effect, with this difference, that the words " or during such part of that time as the mine has been worked," are not in s. 132 of the Act of 1906 and appear for the first time in s. 153 and cl. 12 of the schedule of the Act of 1919.

In the year 1923 the respondents assessed the appellants in respect of the Broken Hill mine. The value was based on the output during the years 1919, 1920 and 1921. It appears that during those years ore to the total value of 274,792*l.* 2*s.* 9*d.* had been produced, and the mine had been worked for a total of 205 days only during the three years (1), by reason at one time of strikes and at another time owing to the low price of material rendering the production of ore unprofitable. All through, however, maintenance work was continued, such as keeping the surface works in repair, pumping the mine, and keeping the underground workings in order. The question that arose between the appellants and respondents, and which this Board is now called upon to decide, is whether under the terms of s. 153 and cl. 12 of the third schedule to the Act of 1919, already set forth, the average value of the ore won during the three years 1919, 1920 and 1921, should be arrived at by dividing the value of all the ore won during the said three years (i.e., 274,792*l.* 2*s.* 9*d.*) by three, as the appellants contended and now contend, or by applying to the said value a fraction represented by the number of days worked during the said three years over the number of days in a year—namely, $\frac{205}{365}$ or, in other words, that the sum of 274,792*l.* 2*s.* 9*d.* should be multiplied by 205 and divided by 365.

The case was first heard before Pike J., the judge of the Land and Valuation Court, who, following a decision in a previous year (which will hereafter be referred to) of the

(1) The mine was worked in 1919 from January 1 until May 5. In 1920 it was not worked at all. In 1921 it was worked only for thirteen days in January.—A. M. T.

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High Court of Australia, decided in favour of the contention of the respondents, but stated a case for the opinion of the Supreme Court of New South Wales, who on June 25, 1924, sustained the judgment of Pike J., holding that the case was covered by the High Court decision. From that judgment the present appeal comes before this Board, and the appeal involves, therefore, a consideration of the decision of the High Court on which the judgment appealed from was based.

In that case the appellants had been assessed by the respondents in respect of its Broken Hill mine under the Act of 1919 on the unimproved capital value calculated on the output of the mine for the years 1917, 1918 and 1919. It appeared that during the said three years the mine had been worked during the whole of the years 1917 and 1918 and for a period amounting to 160 days only in the year 1919. To ascertain the unimproved capital value the respondents divided the total saleable value of the output during the said three years by $2\frac{160}{865}$ in order to arrive at the annual average saleable value.

The appellants appealed from the valuation to a judge of the District Court, who upheld the valuation of the respondents. On an appeal by the present appellants to the Supreme Court of New South Wales, that Court, consisting of the Chief Justice (Sir William Cullen) and two other judges, unanimously reversed the decision of Bevan J., holding that the valuation must be made by taking the total actual output for the three years and dividing it by three and not by two and a fraction. The reasons for the decision were the same as the reasons for the decision in *North Broken Hill, Ld.* v. *Broken Hill Municipal Council.* (1)

The respondents then appealed from this decision to the High Court of Australia, where by a majority of three judges to one, the appeal was allowed and the decision of the District Judge restored; Knox C.J., who dissented, adopted the view taken by the judges of the Supreme Court: *Broken Hill Municipal Council* v. *Broken Hill Proprietary Co.* (2)

Their Lordships are of opinion that the decision of the

(1) 21 S. R. (N. S. W.) 758. (2) 30 C. L. R. 400.

Supreme Court and of Knox C.J. was right and that upon the true construction of s. 153 and cl. 12 of Sch. 3, the average annual value of the ore won during the three years ought to be arrived at by dividing the value of the said ore by three.

It is to be noted, as pointed out by Cullen C.J. in his judgment in the Supreme Court, that the respondents are given several alternative methods of ascertaining the unimproved capital value by s. 153, and amongst these was the one which they adopted—namely, "by valuation based on output in accordance with this section." "That," as the Chief Justice says, "I conclude, from the wording of the section, to be actual output, not some potential or hypothetical output arrived at by a calculation of what might have been produced, but was not actually produced from the mine." There is nothing in the section from which it could be inferred that anything but actual output was intended, but, on the contrary, it seems to be impossible to construe such words as: "the saleable value to the mineowner of the ore or mineral won from the mine . . . . such value to be determined as such ore, mineral or product leaves the area within which such mine is situate," as referring to any estimated or hypothetical output. There may, no doubt, be cases when it would be impossible to find an average output, as, for instance, when a mine had only been worked for a portion of a year; but it must not be forgotten that the respondents have other methods of valuation open to them if such difficulties arise.

It was urged before this Board that the introduction into s. 153 of the words "during such part of that time as the mine has been worked," ought to be construed as providing for such a case as the present, and thereby supporting the contention of the respondents. Their Lordships cannot accept that view having regard to the other terms of the section already referred to, and it is not unimportant to observe that notwithstanding the introduction of those words, the Act of 1919 still retains the words at the end of sub-s. 3 of s. 153—namely, "such value to be determined as such ore or mineral or product leaves the area within which

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such mine is situate," which words are taken from sub-s. 2 (*b*) of s. 132 of the Act of 1906.

Having regard to the language of the section it is unnecessary to lay down any construction or limitation of the words in question, but their Lordships see no reason for disagreeing with the view of the Chief Justice, when he says: "The words 'or during such part of that time as the mine has been worked' obviously guard against the difficulty which would have arisen in the case of mines which had not commenced to be worked three years prior to the year in which the rate is to be struck."

It was also contended before this Board on behalf of the respondents that having regard to the said decision of the High Court of Australia the question raised by this appeal is res judicata as between the appellants and the respondents, and the appellants are estopped from contending that such decision of the High Court of Australia is wrong. It has been pointed out that no such question was raised or pleaded either before the District Court or the Supreme Court in New South Wales, nor has there been any adjudication or finding upon it. There is, however, no substance in this contention. The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question—namely, the valuation for a different year and the liability for that year. It is not eadem questio, and therefore the principle of res judicata cannot apply.

Their Lordships are of opinion that this appeal should be allowed with costs here and in both the Courts in New South Wales, and that a declaration should be made that upon the true construction of sub-s. 3 of s. 153 of the Act of 1919 in ascertaining the unimproved capital value of the mine the saleable value of all the ore won from the mine during the years 1919, 1920 and 1921 should be divided by three.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Light & Fulton.*

Solicitors for respondents: *Kimbers, Williams & Co.*

[PRIVY COUNCIL.]

WAIMIHA SAWMILLING COMPANY, LIMITED (IN LIQUIDATION) . . . } APPELLANTS;

AND

WAIONE TIMBER COMPANY, LIMITED RESPONDENTS.

J. C.*
1925
June 30.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Registration of Titles—Unregistered Agreement affecting registered Title—Registration of Purchaser—Pendency of Litigation as to Agreement—"Fraud"—Land Transfer Act, 1915 (6 *Geo.* 5, *No.* 35, *N. Z.*), *ss.* 58, 197.

A proprietor of land in New Zealand, who was registered under the Land Transfer Act, 1915 (N. Z.), agreed in 1916 to grant the right to cut timber on the land to the appellants, who registered a caveat under the Act in respect of the agreement. In 1920 the proprietor sold the land to the respondents who, in June, 1921, obtained registration of their title. At the date of that registration a Court had declared that the agreement had been validly determined by the vendor, but to the knowledge of all parties an appeal was pending; an order had been made discharging the caveat and from that order there had been no appeal. The registration of the respondents had been carried through hastily, as it was thought that possibly an injunction would be applied for. In July, 1921, the Court of Appeal declared that the respondents had no valid ground for determining the agreement. The appellants now claimed that the respondents' title was subject to their rights under the agreement.

Sect. 58 of the Act provided that, except in the case of fraud, a registered proprietor held free from any claim not appearing on the register, subject to exceptions not material to the case. Sect. 197 provided that knowledge of an unregistered interest should not be imputed as fraud:—

Held, that the circumstances in which the respondents had obtained registration did not constitute "fraud" within the meaning of s. 58 of the Act, and that the respondents' title was not affected by the pendency of the litigation with regard to the appellants' rights under the agreement.

Assets Co. v. *Mere Roihi* (1905) A. C. 176 followed.

Fels v. *Knowles* (1906) 26 N. Z. L. R. 604 approved.

Judgment of the Court of Appeal affirmed.

APPEAL (No. 61 of 1924) from a judgment of the Court of Appeal of New Zealand (March 29, 1923), dismissing an action brought by the appellants against the respondents in the

* *Present:* LORD BUCKMASTER, LORD ATKINSON, and LORD SHAW.

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Supreme Court, and referred to the Court of Appeal by consent.

The appeal raised questions as to the effect of the Land Transfer Act, 1915 (6 Geo. 5, No. 35, of New Zealand).

The facts are stated in the judgment of the Judicial Committee.

1925. May 14. *Alexander Grant K.C.* and *Somervell* for the appellants.

Maugham K.C. and *W. M. Hunt* for the respondents.

June 30. The judgment of their Lordships was delivered by

LORD BUCKMASTER. The respondents, the Waione Timber Company, Ld., are the registered proprietors of a piece of land situate at Waimiha known as Rangitoto Tuhua No. 80 B.I.C. and the appellants claim that this title is subject to whatever rights they possess by virtue of an agreement in writing dated December 23, 1916. The action was heard by Herdman J., and he, after taking the evidence, removed the case for argument into the Court of Appeal, who decided (Stout C.J. dissenting) that the respondents had acquired a good title to the land, freed from any claims on the part of the appellants. From that decision this appeal has been brought. The question of what rights the appellants originally possessed in the land has been the subject of consideration in several Courts and with varying consequences. For the determination of this appeal it is desirable to narrate in some detail how those rights arose and how they have been dealt with. On December 23, 1926, a man called Howe was the registered owner of the land in question, and by the agreement of that date he granted to the appellants the right to cut timber on and to carry it away from the said land, he also, for the better exercise of such rights, granted them further rights of building sawmills, laying tramways along roads, etc. Such instrument could not be registered under the Land Transfer Act, but the appellants, on August 23, 1917, lodged a caveat against the title to protect their rights. In July, 1919, Howe, alleging that there had been breaches

of covenant, purported to determine the agreement and re-entered on the land. The appellants thereupon brought an action for a declaration that the agreement was still on foot, and in the alternative applied for relief against the forfeiture.

This latter question was put down for argument as a preliminary point of law and, on January 13, 1920, the Supreme Court decided that the appellants' rights under the agreement constituted a lease, and that they were entitled to relief. From this decision Howe appealed. The action came on for trial before this appeal was heard, and on May 13, 1920, Sim J. decided that Howe had validly determined the rights of the appellants, but withheld the entry of judgment until the decision of the Court of Appeal on the preliminary question of law. This judgment was given on July 28, 1920, and the Court of Appeal then decided that the agreement did not constitute a lease and that no relief could be given against the alleged forfeiture. Meanwhile Howe, who appears to have been heavily overdrawn at his bank and badly in need of money, had entered into an agreement with one Wilson to buy the land, and, on August 2, 1920, Howe applied to the appellants for the removal of the caveat. This request was declined, and Howe was informed that an appeal against the judgment of May 13, 1920, was under consideration. Upon this refusal proceedings were commenced by Howe to obtain an order of the Court for removing the caveat, and, on September 20, 1920, this order was made by Sim J. A further agreement was then made on September 25, 1920, with Wilson, and a transfer of the freehold portion of the land was executed and registered in his name on September 30, 1920, and sub-leases of the leasehold portion on October 5, 1920, and May 27, 1921. It is admitted throughout that in these negotiations Wilson acted with the intention of forming a company to whom the land should be transferred, and the respondent company having been formed in pursuance of this intention on June 8, 1921, the land was transferred to them and registration effected in their name.

No step was taken to appeal against the order of Sim J.

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removing the caveat, but, on September 9, 1920, the appellants appealed against the decision of May 13, 1920, lodged the necessary security, and before the judgment of September 20, 1920, notified both Sim J. and Howe's solicitors that an appeal had been commenced. This appeal came on for hearing on July 18, 1921, when the Court of Appeal declared that there was no valid ground for determination of the rights granted to the appellants by the agreement of December 23, 1916, and they referred the case back for the assessment of damages.

The proceedings subsequent to this are not really material for the present purpose. They are not fully set out in the record and it is not easy to understand exactly what occurred. It does appear, however, that, the inquiry as to damages proving abortive, the Court of Appeal on April 24, 1922, amended the judgment of July 18, 1921, by deleting therefrom the direction as to assessment of damages and substituting the words "In order that the Supreme Court shall enter judgment for such relief as the appellant company may be entitled to under its statement of claim." It must be remembered that this could not, however, be based upon the view that the agreement of December 23, 1916, constituted a lease, as the Court of Appeal had themselves definitely decided that it did not. Apart from this the only possible remedy would have been a remedy by way of an injunction, as in the case of *James Jones & Sons* v. *Earl of Tankerville* (1), but such a remedy depends upon very special circumstances; in the result of events such an order as against Howe would have been inoperative, and the question whether, if such relief were to be granted, it could be granted against the present respondents really depends upon the point that arises for decision in this appeal, and that is whether, in the circumstances, notwithstanding the removal of the caveat, the purchasers of the property were affected by the rights created under the agreement of December 23, 1916.

The appellants support their case by two independent arguments: (1.) That there was actual fraud committed in obtaining the registration of Wilson as the absolute owner.

(1) [1909] 2 Ch. 440.

(2.) That as at the date of this registration litigation was pending affecting the property, the title was necessarily subject to whatever rights the appellants would be held to possess if this litigation resulted in their favour.

The first of these questions depends upon the construction of two important sections of the Land Transfer Act, 1915—namely, s. 58 and s. 197, which are in the following terms :—

" 58. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in the case of fraud, hold the same subject to such incumbrances, liens, estates, or interests as may be notified on the folium of Register constituted by the grant or certificate of title of such land, but absolutely free from all other incumbrances, liens, estates, or interests whatsoever—(*a*) Except the estate or interest of a proprietor claiming the same land under a prior certificate of title or under a prior grant registered under the provisions of this Act ; and (*b*) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land ; and (*c*) Except so far as regards any portion of land that may be erroneously included in the grant, certificate of title, lease, or other instrument evidencing the title of such registered proprietor by wrong description of parcels or of boundaries."

" 197. Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire into or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge

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that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

The first of these sections provides in plain language that, except in the case of fraud, the registered proprietor of land holds it freed from everything except what is notified on the register, subject to the three exceptions, not one of which is relevant for the present purpose; while s. 197 expressly declares that knowledge of the existence of an unregistered interest shall not of itself be imputed as fraud. Upon the first point, therefore, it is plain that unless conduct coming within the meaning of the word "fraud" as used in these sections can be imputed to the respondents their title succeeds.

In the words of the Court of Appeal in *Fels* v. *Knowles* (1): "The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor such person upon the registration of the title under which he takes from the registered proprietor has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute." ("By statute" would be more correct.) "Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest or in the cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered."

Now fraud clearly implies some act of dishonesty. Lord Lindley in *Assets Co.* v. *Mere Roihi* (2) states that: "Fraud in these actions" (i.e., actions seeking to affect a registered title) "means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud—an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud."

If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently

(1) 26 N. Z. L. R. 604, 620. (2) [1905] A. C. 176, 210.

keeping the register clear. It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances. The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest. In the present case fraud is sought to be established by the following facts: That Wilson knew of the appellants' claim and that they were pursuing litigation to have that claim upheld, and also that the solicitors of Howe immediately after the removal of the caveat stated that they desired the utmost expedition to get the transaction registered in favour of Wilson, because they regarded it as possible that an application might be made for an injunction, the documents being in fact prepared with such haste that the boundaries had to be rectified subsequently to the transfer. All this is true, but it is also true that Howe knew that the judgments of the Courts were in his favour, and that any hindrance or delay in the carrying out of the transaction would cause him grave embarrassment, so that having got a judgment in his favour, he wished to be secure and protected against the delay that might ensue if further steps were taken in the litigation; at the same time he was also aware of this—that an original notice of appeal in the action had not been proceeded with, and the learned judge before whom the case had come not being satisfied as to the bona fides of the appellants and realizing the importance of Howe being prevented from dealing with his lands expressly removed the caveat in order that those dealings should not be delayed. Had that judgment been appealed against and the order of Sim J. reversed, different considerations might have arisen, but it was left unchallenged, and all that Howe did was to act upon the hypothesis that it was sound and to attempt to strengthen the position as far as possible by speedy completion of the transaction. Even now no attempt has been made to question the judgment of Sim J., and that circumstance, in their Lordships' opinion, alone is sufficient; for the learned judge, with full knowledge of the facts, held that the hindrance to dealing with the property caused by the

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entry of the caveat should be removed, and even if he were wrong in the view that he took it seems to their Lordships impossible to say that people who acted upon the faith of that judgment were guilty of fraud.

The second question can be dealt with briefly. In their Lordships' opinion the judgment of Hosking J. is complete and unassailable upon this point. Litigation is the means by which a disputed interest in land can be established. If knowledge of the interest itself does not affect a registered proprietor knowledge that steps are being taken to assert that interest can have no more serious effect.

Their Lordships will humbly advise His Majesty that this appeal ought to be dismissed with costs.

Solicitors for appellants: *Batham & Greig.*

Solicitors for respondents: *Herbert Smith, Goss, King & Gregory.*

[PRIVY COUNCIL.]

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LORD STRATHCONA STEAMSHIP COMPANY, LIMITED . . . . . } APPELLANTS;

AND

DOMINION COAL COMPANY, LIMITED RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Shipping—Charterparty—Purchase of Ship with Notice of Charterparty——Purchaser refusing to perform Charterparty—Charterers' Right to an Injunction.

The purchaser of a ship who has notice of the terms of a charterparty entered into for its employment is in the position of a constructive trustee, and he can be restrained, at the suit of the charterers, from employing the ship in any way inconsistent with the charterparty. It is not material that specific performance cannot be enforced; the Court can grant an injunction if a negative stipulation is expressed or clearly implied in the charterparty. Notice does not, however,

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* *Present:* VISCOUNT HALDANE, LORD SHAW, LORD WRENBURY, LORD CARSON, and LORD BLANESBURGH.

impose upon the purchaser a liability in damages to the charterers for failure to perform the charterparty.

Principle laid down by Knight Bruce L.J. in *De Mattos* v. *Gibson* (1858) 4 De G. & J. 276, 282 approved and applied.

Judgment of the Supreme Court affirmed, subject to variations.

J. C.

1925

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APPEAL (No. 171 of 1924) from a judgment of the Supreme Court of Nova Scotia, en banc (March 1, 1924), affirming a judgment of Mellish J. (May 18, 1922).

The respondents, by a charterparty dated July 14, 1914, chartered the steamship *Lord Strathcona* for ten successive St. Lawrence seasons from 1915, with an option to extend the charterparty for another five successive seasons, and a further option as to three additional seasons. The ship, which had been built in accordance with a specification supplied by the respondents, went into their service under the charterparty in 1916. At the end of that season she was requisitioned by the British Government, and remained under requisition during 1917 and 1918. The requisition was withdrawn in July, 1919, and the ship was employed by the respondents until December, 1919. The Lord Curzon Steamship Company sold the ship in 1917, and, after two further transmissions of title in 1919, the appellants in 1920 became the owners. They refused to perform the charterparty during the St. Lawrence season of 1920, contending that there had been a frustration by reason of the requisition. The appellants and the respondents, without prejudice to their respective contentions, entered into an agreement on July 10, 1920, under which the *Lord Strathcona* was placed at the use of the respondents during the remainder of the 1920 season.

On July 31, 1920, the respondents commenced an action in the Supreme Court of Nova Scotia against the appellants and the Lord Curzon Steamship Company claiming a declaration that the appellants were bound to carry out the charterparty, and to recover money held under the agreement of July 10, 1920; they further claimed an injunction restraining the appellants from using the *Lord Strathcona* in any way inconsistent with the charterparty.

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The Lord Curzon Steamship Company did not enter an appearance.

The appellants pleaded that the further performance of the charterparty had been frustrated; and that in any case, there being no privity of contract between themselves and the respondents, the charterparty was not binding upon them.

The trial judge, Mellish J., held that the charterparty was not frustrated, and made an order which (inter alia) restrained the appellants from employing the ship in any way inconsistent with the terms of the charterparty, and declared the respondents' right to recover damages against the appellants. The full terms of the order of Mellish J., so far as they are material to the order made upon the present appeal, appear in a footnote at the end of the judgment.

Upon appeal to the Supreme Court en banc the order of Mellish J. was affirmed.

1925. June 22, 26, 30; July 2. *Le Quesne K.C.* and *Pritt* for the appellants. No injunction should have been made against the appellants as purchasers of the ship. The Court relied upon the dictum of Knight Bruce L.J. in *De Mattos* v. *Gibson* (1) to the effect that a purchaser of a chattel is bound by a contract as to its user made by the vendor if he had notice of that contract. Later decisions show that in the case of real property notice by itself does not give rise to liability on the part of a purchaser: *London and South Western Ry. Co.* v. *Gomm* (2); *London County Council* v. *Allen* (3); nor does it in the case of the purchase of a chattel: *Taddy & Co.* v. *Sterious & Co.* (4); *Mc. Gruther* v. *Pitcher* (5); *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (6); *Barker* v. *Stickney* (7); Fry on Specific Performance, 6th ed., §§ 855 to 862; Pollock on Contracts, 9th ed., pp. 251, 261. The dictum apparently was followed in *Catt* v. *Tourle* (8) and in

(1) 4 De G. & J. 276, 282.
(2) (1882) 20 Ch. D. 562.
(3) [1914] 3 K. B. 642.
(4) [1904] 1 Ch. 354.
(5) [1904] 2 Ch. 306.
(6) [1915] A. C. 847.
(7) [1919] 1 K. B. 121.
(8) (1869) L. R. 4 Ch. 654.

Luker v. *Dennis* (1); but those decisions are not now good law; it was referred to also in *Macdonald* v. *Eyles* (2) and *Formby* v. *Barker*. (3) In *De Mattos* v. *Gibson* (4) the injunction granted was dissolved upon appeal; and throughout that case there is no suggestion that damages were recoverable against the mortgagee defendant. It is well established that specific performance of a charterparty will not be granted. The effect of an injunction would be that the ship might be laid up; that is a reason for not granting one: *Whitwood Chemical Co.* v. *Hardman*. (5) In cases in which an injunction has been granted after the sale of a ship, the vendor has been in possession and able to perform the charterparty: *Messageries Imperiales Co.* v. *Baines* (6); *Collins* v. *Lamport* (7); *Le Blanch* v. *Granger* (8); *Sevin* v. *Deslandes*. (9) Secondly, the further performance of the charterparty was frustrated by the requisition: *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (10); *Anglo-Northern Trading Co.* v. *Emlyn Jones & Williams* (11); *Bank Line* v. *Arthur Capel & Co.* (12)

Sir Leslie Scott K.C., *F. Hinde* and *F. L. Moss* for the respondents. There was no frustration. The decision of the Court of Appeal in *Dominion Coal Co.* v. *British and Chilian Steamship Co.* (13) dealt with a similar charterparty, and is directly in point. Reference was made also to *Larrinaga & Co.* v. *Société Franco-Americaine des Phosphates* (14); *Dominion Coal Co.* v. *Roberts* (15); and *Dominion Coal Co.* v. *Maskinonge Steamship Co.* (16) The parties to the charterparty themselves recognized its existence after the requisitioning; it is therefore impossible to infer that the parties would have intended that it should come to an end in the events which happened. Upon the authorities cited for the appellants, the respondents were

(1) (1877) 7 Ch. D. 227.
(2) [1921] 1 Ch. 631, 640.
(3) [1903] 2 Ch. 539.
(4) 4 De G. & J. 276.
(5) [1891] 2 Ch. 416.
(6) (1863) 7 L. T. 763.
(7) (1864) 11 L. T. 497.
(8) (1866) 35 Beav. 187.
(9) (1860) 30 L. J. (Ch.) 457.
(10) [1916] 2 A. C. 397.
(11) [1917] 2 K. B. 78.
(12) [1919] A. C. 435.
(13) C. A. April 12, 1919; unreported.
(14) (1923) 29 Com. Cas. 1.
(15) (1920) 36 Times L. R. 837.
(16) [1922] 2 K. B. 132.

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entitled to an injunction, though the relief granted may have been too wide. The general principle laid down by Knight Bruce L.J. in *De Mattos* v. *Gibson* (1) has been recognized in numerous decisions and in textbooks of authority. It is clearly applicable to the facts of the present case.

Pritt in reply. The evidence did not establish that each of the successive owners had notice of the terms of the charterparty. But in any case there is no principle of law or equity under which the purchaser of a ship is bound by the terms of a charterparty of which he has notice. The charterparty conferred upon the respondents no interest in the ship: *Federated Coal and Shipping Co.* v. *The King* (2); Scrutton on Charterparties, 12th ed., pp. 5, 6. The relation between the original owners and the charterers was purely contractual; no trust sprang into existence upon the owner assigning his interest in the ship. The contract was so far personal that it cannot be treated as assignable in equity. In the absence of a novation the appellants should not be restrained by injunction, and clearly are not liable in damages.

Nov. 17. The judgment of their Lordships was delivered by

LORD SHAW. This is an appeal from a judgment and order of the Supreme Court in Appeal of Nova Scotia (en banc), dated March 1, 1924, which affirmed a judgment and order of Mellish J. in the Supreme Court of Nova Scotia, dated May 18, 1922.

The questions involved in the case depend upon a consideration of the charterparty about to be mentioned and of the actings of parties under and in reference to that contract.

The charterparty was dated April 20, 1914, corrected to July 24, 1914. It was made between the Lord Curzon Steamship Company, Ld., as the owners of the steamship *Lord Strathcona*, and the respondents as charterers thereof. The charterparty was a long term charterparty—namely, for ten consecutive St. Lawrence seasons, commencing with the year 1915, with the option to the respondents of continuing the charterparty for a further period of five more seasons and a

(1) 4 De G. & J. 276, 282. (2) [1922] 2 K. B. 42, 46.

still further option of three more seasons thereafter. Should these options be exercised by the respondents as charterers the period of the contract thus extended to eighteen years. The St. Lawrence season referred to was to commence, except as to the first season 1915, five days prior to the opening of navigation to Montreal and not later than May 15 in each year. The re-delivery to the owners of the steamship was to be between November 15 and December 15 in each year.

The ship went into the service of the respondents in 1916. She was delivered, or commenced service on July 10, and she continued during the St. Lawrence season—namely, until December 14, 1916, being used by the respondents for their trade purposes under the charterparty. The British Government, which had previously intimated that the vessel would be required for the purposes of war in 1915, when she was ready for the year, abandoned this position and allowed the use of the vessel under the charter for the season 1916 as stated.

They made, however, an effective requisition of the vessel at the close of the 1916 season, and the vessel remained under requisition for 1917 and 1918 by the British Government. She came on service again by the withdrawal of the Government requisition on July 2, 1919, and remained on service till the end of the season—namely, December, 1919. Shortly put, the vessel was thus under requisition for some two and a-half years—namely, from the end of the 1916 season until early in July, 1919. During the course of these years various changes, to be afterwards referred to, were made in the ownership of the vessel.

There are three questions which arise in the appeal—these are, first, whether the contract under the charterparty was frustrated by the action of the Government, as just described. Second, whether any rights of the Dominion Coal Company, as charterers of the vessel, existed as against the appellants, the Lord Strathcona Steamship Company, as owners thereof, there having been no direct privity of contract between those parties. The third question has reference to an order upon

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the appellants to repay a portion of the hire of the *Lord Strathcona* under an agreement made without prejudice.

The questions will be dealt with in their order.

1. On the question of frustration their Lordships are clearly of opinion that this doctrine, which has been much developed and commented upon in recent years, cannot be applied to the facts of the present case. Put shortly, frustration can only be pleaded when the events and facts on which it is founded have destroyed the subject matter of the contract, or have, by an interruption of performance thereunder so critical or protracted as to bring to an end in a full and fair sense the contract as a whole, so superseded it that it can be truly affirmed that no resumption is reasonably possible.

It is a mistake to say that the doctrine of frustration is a hard and fast doctrine which can be applied as a general principle in a definite measure to all cases alike. The facts and circumstances of each particular contract as well as the nature and duration of the interruption to performance must all be taken into account. Shipping cases afford easy illustrations of the variety of circumstances alluded to. A voyage is arranged to be made during fixed dates. The substantial interruption of such a voyage almost necessarily concludes the question of frustration in the affirmative. Or, again, a charter is for a short term and into that term such an interruption is projected as to preclude business arrangements being readjusted so as to suit limited and disjointed periods of time; then, again, it becomes wellnigh clear that frustration has resulted.

In the present case there is a seasonal charter extending over a long period of possibly eighteen years. The interruption has been concluded and the vessel has been restored in good sailing order after a period of use by the Government of, say, three seasons. Upon these facts then in truth the question has really settled itself in the sense that a long balance of time and season remains during which, after resumption, the contract can be effectively carried on. It happens in the present case that, after the Government interruption had

ceased, the parties did resume the practice of running the vessel as owners and charterers. The range of business has not been lost, the suitability of the vessel for performance has not been impaired. In these circumstances their Lordships are clear that the judgments of the Courts below upon this topic are right and that frustration of the contract contained in the charterparty did not occur. Had the question accordingly arisen between the original charterers of the vessel the Lord Curzon Steamship Company, as owners, and the respondents as charterers, the case would have been at an end.

2. Upon the point of privity of contract and the nature of the right or remedy still open to the charterers of the vessel the following facts and dates have to be kept in view. The writ was issued by the respondents on July 31, 1920. It was directed against the appellants as present owners and against the Lord Curzon Steamship Company as parties to the charterparty, and it certainly claimed a declaration and made demands which are of a wide character, and have been exposed to considerable criticism. Generally speaking their Lordships look upon the writ as an attempt to substitute the appellants in the entirety of the obligations resting upon the Lord Curzon Steamship Company as the original owners. A declaration was claimed by the respondents under the charterparty, under which the appellants could be called upon as in an action of specific performance to perform the obligations under the charter in the same sense and degree as the original owners, the Lord Curzon Steamship Company. It will be necessary to see whether, under the principles of English jurisprudence, this demand can be justified as stated, or whether, under the other claims made in the writ, English equity is able to afford to the charterers against the present owners, the appellants, any remedy for the wrong arising to them by the threatened loss of their rights under the charterparty.

The charterparty is dated April 20, 1914, corrected to July 24, 1914. The ship had been built in England for the Lord Curzon Steamship Company under plans provided by

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the Dominion Coal Company, and it was agreed that, when complete, she should be chartered to the respondents, and this was done by the charterparty mentioned. Then occurred a series of transmissions of title to the ship. The dates are: December 14, 1917; Bill of Sale; Lord Curzon Company to The Century Shipping Company. February 25, 1919; Bill of Sale; Century Shipping Company to Lord Lathom Company. December 18, 1919; Bill of Sale; Lord Lathom Company to Lord Strathcona Company (No. 1). June 22, 1920; Bill of Sale; Lord Strathcona Company (No. 1) to Lord Strathcona Company (incorporated in 1920).

So far as the knowledge of the existence of the charterparty was concerned their Lordships are clearly of opinion that all these successive owners were well aware of it, and this knowledge was, by notice, passed very clearly and properly on from each owner to the successor. It was only very late in the day when any flaw on this point was attempted to be taken.

An important document in the case is that of September 1, 1919—namely, a memorandum of agreement by which the Lathom Company agreed with the Strathcona Company about to be formed, which contained the following clause: "The steamer is chartered to the Dominion Coal Company as per charterparty dated New York, April 20, 1914, corrected to July 24, 1914, which charter the buyers undertake to perform and accept all responsibilities thereunder as from date of delivery in consideration of which the buyers shall receive from date of delivery all benefits arising from the said charter. All liabilities up to date of delivery to buyers to be for account of sellers."

In the opinion of the Board the appellants thoroughly understood that the charterparty and its responsibilities and obligations thereunder were to be respected. This is not a mere case of notice of the existence of a covenant affecting the use of the property sold, but it is the case of the acceptance of their property expressly sub conditione.

The position of the case accordingly is that the appellants are possessed of a ship with regard to which a long running

charterparty is current, the existence of which was fully disclosed, together, indeed, with an obligation which the appellants appear to have accepted to respect and carry out that charterparty. The proposal of the appellants and the argument submitted by them is to the effect that they are not bound to respect and carry forward this charterparty either in law or in equity, but that, upon the contrary, they can, in defiance of its terms, of which they had knowledge, use the vessel at their will in any other way. It is accordingly, when the true facts are shown, a very simple case raising the question of whether an obligation affecting the user of the subject of sale, namely, a ship, can be ignored by the purchaser so as to enable that purchaser, who has bought a ship notified to be not a free ship but under charter, to wipe out the condition of purchase and use the ship as a free ship. It was not bought or paid for as a free ship, but it is maintained that the buyer can thus extinguish the charterer's rights in the vessel, of which he had notice, and that the charterer has no means, legal or equitable, of preventing this in law.

In the opinion of the Board the case is ruled by *De Mattos* v. *Gibson* (1), also a shipping case, the case of the user of a piece of property by a third person (e.g., the respondent company in this case) of " the property for a particular purpose in a specified manner." Their Lordships think that the judgment of Knight Bruce L.J. (2) plainly applies to the present case : " Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller." A principle, not without analogy, had previously been laid down in reference to the user of land.

(1) 4 De G. & J. 276. (2) Ibid. 282.

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In the opinion of their Lordships the case of *De Mattos* v. *Gibson* (1) still remains, notwithstanding many observations and much criticism of it in subsequent cases, of outstanding authority.

The general character of the principle on which a Court of equity acts was explained in *Tulk* v. *Moxhay*. (2) The plaintiff there was owner in fee of Leicester Square, and several houses forming the Square. He sold the property to one Elms in fee, and the deed of conveyance contained a covenant obliging Elms, his heirs and assigns, to "keep and maintain the said piece of ground and Square Garden . . . . in its then form . . . . in an open state, uncovered with any buildings." Elms sold to others, and the property came into the hands of the defendant, who admitted that he had purchased with notice of the covenant. The defendant, "having manifested an intention to alter the character of the Square Garden, and asserted a right, if he thought fit, to build upon it," the plaintiff, who still remained owner of several houses in the Square, filed a bill for an injunction. All this is familiar knowledge, but it appears to have been sometimes forgotten what was the nature of the argument for the defendant. He contended that the covenant did not run with the land so as to be binding upon him as a purchaser, and Sir Roundell Palmer, on his behalf, relied on the dictum of Brougham L.C. in *Keppell* v. *Bailey* (3) to the effect that "notice of such a covenant did not give a Court of equity jurisdiction to enforce it by injunction against such purchaser, inasmuch as 'the knowledge by an assignee of an estate, that his assignor had assumed to bind others than the law authorised him to affect by his contract, had attempted to create a burden upon property which was inconsistent with the nature of that property and unknown to the principles of the law and could not bind such assignee by affecting his conscience.'" No reply was called for to this argument, and the Lord Chancellor said that Lord Brougham never could have meant to lay down the

(1) 4 De G. & J. 276. (2) (1848) 2 Ph. 774, 776, 779.
(3) (1834) 2 My. & K. 517, 547.

doctrine "that this Court would not enforce an equity attached to land by the owner, unless under such circumstances as would maintain an action at law." "If that be the result of his observations," added the Lord Chancellor, "I can only say that I cannot coincide with it."

It has sometimes been considered that *Tulk* v. *Moxhay* (1) and *De Mattos* v. *Gibson* (2) carried forward to and laid upon the shoulders of an alienee with notice the obligations of the alienor, and, therefore, that the former is liable to the covenantee in specific performance as by the law of contract, and under a species of implied privity. This is not so; the remedy is a remedy in equity by way of injunction against acts inconsistent with the covenant, with notice of which the land was acquired. The former was the view of Kay J. in *London & South Western Ry. Co.* v. *Gomm* (3); but it was corrected by the Court of Appeal substantially in the sense above stated. So confined, that is, to a remedy in equity by injunction against the violation of restrictive covenants, the application of the principle of *Tulk* v. *Moxhay* (1) was affirmed. The same result had been reached in *Haywood* v. *Brunswick Permanent Benefit Building Society* (4), and other decisions have followed in a like sense.

The cases on this branch of the law are legion. But following the leading authorities just cited there may be specially mentioned that of *Catt* v. *Tourle* (5), in which Selwyn L.J. affirms, with precision, the principles of *Tulk* v. *Moxhay* (1) and *De Mattos* v. *Gibson*. (2)

But *Tulk* v. *Moxhay* (1) is important for a further and vital consideration—namely, that it analyses the true situation of a purchaser who having bought upon the terms of the restriction upon free contract existing, thereafter when vested in the lands, attempts to divest himself of the condition under which he had bought: "it is said that the covenant being one which does not run with the land, this Court cannot enforce it; but the question is, not whether the

(1) 2 Ph. 774, 777.
(2) 4 De G. & J. 276.
(3) 20 Ch. D. 562.
(4) (1881) 8 Q. B. D. 403.
(5) L. R. 4 Ch. 656.

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covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken."

In the opinion of the Board these views, much expressive of the justice and good faith of the situation, are still part of English equity jurisprudence, and an injunction can still be granted thereunder to compel, as in a court of conscience, one who obtains a conveyance or grant sub conditione from violating the condition of his purchase to the prejudice of the original contractor. Honesty forbids this ; and a Court of equity will grant an injunction against it.

It may be mentioned that essentially the same principle has been applied by the House of Lords in the Scotch case of the *Earl of Zetland* v. *Hislop* (1), in which the superior of land (according to law holding the dominium directum thereof and, therefore, of course, having a continuing patrimonial interest therein) granted contracts of feu to various vassals holding the dominium utile of the land under that permanent tenure. By these contracts the vassal, his heirs and assignees and their tenants were prohibited from using the property for carrying on the trade of a publican. Various transactions of sale and transfer of the property had occurred : four of the purchasers asserted their right to carry on a publican's business, and the Earl of Zetland asked interdict (or injunction) against such a violation of the restrictions contained in the feu charter. In the House of Lords, as stated, the patrimonial interest of the superior was affirmed and also his right to interdict unless (which was alleged and which was made the subject of a remit for probation) he was precluded from this remedy by acquiescence and waiver.

It has been said—it was strongly urged for the appellant

(1) (1882) 7 App. Cas. 427.

in this case—that a remedy by way of injunction against the owners not disposing of their ship in any other way than under the charterparty could not be granted because there was no such negative covenant to enforce by injunction.

Lord Selborne, in *Wolverhampton & Walsall Ry. Co.* v. *London & North Western Ry. Co.* (1), disposed of such an argument thus, in language which still remains unimpaired in force: "The technical distinction being made, that if you find the word 'not' in an agreement—'I will not do a thing'—as well as the words 'I will,' even although the negative term might have been implied from the positive, yet the Court, refusing to act on an implication of the negative, will act on the expression of it. I can only say, that I should think it was the safer and the better rule, if it should eventually be adopted by this Court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise, whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression."

A perusal of the numerous decisions on this branch of the law shows that much difficulty has been caused by the attempt to extend these principles to cases to which they could not, by the nature of the case, have been meant to apply. It has been forgotten that—to put the point very simply—the person seeking to enforce such a restriction must, of course, have, and continue to have, an interest in the subject matter of the contract. For instance, in the case of land he must continue to hold the land in whose favour the restrictive covenant was meant to apply. That was clearly the state of matters in the case of *Tulk* v. *Moxhay* (2) applicable to the possession of real estate in Leicester Square. It was also clearly the case in *De Mattos* v. *Gibson* (3), in which the person seeking to enforce the injunction had an interest in the user of the ship. In short, in regard to the user of land or of any

(1) (1873) L. R. 16 Eq. 433, 440.
(2) 2 Ph. 774.
(3) 4 De G. & J. 276.

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chattel, an interest must remain in the subject matter of the covenant before a right can be conceded to an injunction against the violation by another of the covenant in question. This proposition seems so elementary as not to require to be stated. And it is only mentioned because in numerous decisions, as is clearly brought out in the judgment of Lord Wrenbury, then Buckley L.J., in *London County Council* v. *Allen* (1), it was necessary to shear away this misapplication or improper extension of the equitable principle. As Romer L.J. said in *Formby* v. *Barker* (2): "If restrictive covenants are entered into with a covenantee, not in respect of or concerning any ascertainable property belonging to him, or in which he is interested, then the covenant must be regarded, so far as he is concerned, as a personal covenant—that is, as one obtained by him for some personal purpose or object."

Applying that to the case of land and referring to numerous cases upon the subject, Lord Wrenbury says in *London County Council* v. *Allen* (1): "Inasmuch as at the date when the covenant was taken the covenantee had no land to which the benefit of the covenant could be attached, it was held that the benefit of the restrictive covenant could not enure against a derivative owner even where he took with notice."

The Board notes the observations made by Scrutton L.J. in the case of *London County Council* v. *Allen* (3), in which, alluding to various decisions, the learned judge puts this point as to the possible inconvenience, not only private but public, which may result from a strict adhesion to the principle that the enforcement of a restrictive covenant must be confined to those having patrimonial interests in the subject matter. His Lordship takes the not unfamiliar case of restrictive covenants imposed by an owner of a large block of land in the terms of conveyance of the various fractions in which it may be split up for private use, and he observes: "I regard it as very regrettable that a public body should be prevented from enforcing a restriction on the use of

(1) [1914] 3 K. B. 642, 656 to 658. (2) [1903] 2 Ch. 539, 554.
(3) [1914] 3 K. B. 642, 673.

property imposed for the public benefit against persons who bought the property knowing of the restriction, by the apparently immaterial circumstance that the public body does not own any land in the immediate neighbourhood. But, after a careful consideration of the authorities, I am forced to the view that the later decisions of this Court compel me so to hold."

The question here alluded to may subsequently arise, and their Lordships are unwilling, because it is unnecessary in the present case, to make any pronouncement upon it; for the present is, as has been seen, a case as to the user of a ship, with regard to the subject matter of which, namely, the vessel, the respondent has, and will have during the continuance of the period covered by the charterparty, a plain interest so long as she is fit to go to sea. Again, to adopt the language of Knight Bruce L.J. in the *De Mattos* v. *Gibson* (1) case: "Why should it (the Court) not prevent the commission or continuance of a breach of such a contract, when, its subject being valuable, as for instance, a trading ship or some costly machine, the original owner and possessor, or a person claiming under him, with notice and standing in his right, having the physical control of the chattel, is diverting it from the agreed object, that object being of importance to the other? A system of laws in which such a power does not exist must surely be very defective. I repeat that, in my opinion, the power does exist here."

In considering the character of the doctrines of equity in a case like the present it is essential to remember that these doctrines are of several kinds and fall partly, though not exclusively, under different heads. If this is not borne in mind uncertainty and confusion are apt to arise. Dicta of eminent judges which apply under one principle get to be regarded as though they illustrated a principle which is in reality different.

Equity has, in addition to the concurrent jurisdiction, auxiliary and exclusive jurisdiction. The enforcement of trusts is in the main an illustration of the exclusive jurisdiction.

(1) 4 De G. & J. 276, 283.

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The scope of the trusts recognized in equity is unlimited. There can be a trust of a chattel or of a chose in action, or of a right or obligation under an ordinary legal contract, just as much as a trust of land. A shipowner might declare himself a trustee of his obligations under a charterparty, and if there were such a trust an assignee, although he could not enforce specific performance of the obligation, would fail to do so only on the broad ground that the Court of equity had no machinery by means of which to enforce the contract. Subject to this an assignee of the charterer could enforce his title to the chose in action in equity, even though he could not have done so at law.

There are cases of a different type in which equity is proceeding, not on the footing of trust, but of following, by the exercise of concurrent and auxiliary jurisdiction, the analogy of the common law. Such are the cases of so-called equitable easements. This was explained by the Court of Appeal in *London County Council* v. *Allen*. (1) There it was held that an owner of land, deriving title under a person who had entered into a restrictive covenant concerning the land, which covenant did not run with the land at law, was not bound by the covenant although he took the land with notice of it, if the covenantee were not in possession of or interested in land for the benefit of which the covenant was entered into. In the judgments it was pointed out that such a covenant did not run with the land at law, and that there was a series of authorities which showed that in the case of land mere purchase with notice was not sufficient. The reason was that under this head of its jurisdiction equity had followed law except to the extent of recognizing a negative covenant as capable of operating for the benefit of a dominant tenement. The principle proceeded on the analogy of a covenant running with the land or of an easement, as explained by Jessel M.R. in *London & South Western Ry. Co.* v. *Gomm*. (2) This restriction of the principle on the analogy of easements at law rendered mere notice insufficient, and cut down the jurisdiction from the wider principle stated by Knight

(1) [1914] 3 K. B. 642. (2) 20 Ch. D. 562.

Bruce L.J. in *De Mattos* v. *Gibson* (1) to the narrower head established in order to accord with the legal analogy in the case of land.

But in no other regard does this or any other decision of commanding importance seem to affect the general principle which Knight Bruce L.J. laid down. If a man acquires from another rights in a ship which is already under charter, with notice of rights which required the ship to be used for a particular purpose and not inconsistently with it, then he appears to be plainly in the position of a constructive trustee with obligations which a Court of equity will not permit him to violate. It does not matter that this Court cannot enforce specific performance. It can proceed, if there is expressed or clearly implied a negative stipulation. The judgment of St. Leonards L.C. in *Lumley* v. *Wagner* (2) appears to be conclusive of the principle: "Wherever," says that very eminent judge, "this Court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give."

For the reasons already fully set forth the Board is of opinion that the injunction granted by Mellish J. in cl. 7 of his order of June 20, 1922, was correct, and was properly affirmed by the Supreme Court for the reasons set forth by Chisholm J. The fundamental point indicated is thus determined.

The consequences of this decision, both as to the future use of the vessel and as to damages, will be applied in the Court below. It is incredible that the owners will lay up the vessel rather than permit its use under the contract, of which they were notified, and the provisions of which it is now determined they ought to respect. The resumption of use under the charterparty will thus simplify the ascertainment of damages. An interlocutory judgment has already been

(1) 4 De G. & J. 276. (2) (1852) 1 D. M. & G. 604, 619.

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pronounced against the other defendant, the Lord Curzon Steamship Company, and the Court below will determine the working out of the point of damages in view of these circumstances. It is to be hoped that now the question of principle has been determined the parties may work out without further appeal to Courts of law the consequential details.

The question as to the moneys deposited with the Eastern Trust Company at Montreal is one of no little difficulty. The vessel had been redelivered by the Government, and the parties were at variance as to whether the charterers should have the use of the vessel on the charterparty terms, the appellants maintaining that the contract had been frustrated. In these circumstances an arrangement was made for chartering the vessel by the appellants to the respondents for the balance of the 1920 season at $66,000 per month, being much in excess of the hire under the charterparty. The owners, the appellants, took one half of this, the other half was, from time to time, paid over to the Eastern Trust Company to abide the orders to be made under this litigation. The moneys so paid to the Trust have by cl. 3 of Mellish J.'s order been rightly ordered to be repaid to the respondents, and cl. 3 will accordingly stand. But the learned judge by cl. 2 has also ordered the appellants to repay to the respondents the amount by which the hire paid directly to the appellants exceeded the charterparty rate. In their Lordships' view, however, the true effect of the agreement was that the hire actually payable thereunder to the appellants as distinct from that placed in medio was to be retained by the appellants as their own in any event. It was only on this footing that they entered into the agreement. That cl. 2 will accordingly be struck out.

Their Lordships will, therefore, humbly advise His Majesty that the appeal be allowed for the purpose of variation of Mellish J.'s order (1) as follows: (1.) By omitting from

(1) The order of Mellish J., so far as material, was as follows:— "1. That the time charterparty of the steamship *Lord Strathcona* dated April 20, 1914, corrected to July 24, 1914, made between plaintiff and

cl. 1 thereof all the words after the words "valid and subsisting contract." (2.) By omitting cl. 2. (3.) By omitting cl. 4. (4.) By omitting from cl. 6 the words "the amounts certified by the referee under cl. 2 hereof, and the amount of the said damages under cl. 4 hereof when assessed, and." Subject to these variations, the said order should be affirmed.

The cause should be remitted to the Court below to deal with the question of damages. There will be no costs of this appeal, the order as to costs in the Court below to stand.

Solicitors for appellants: *Ince, Colt, Ince & Roscoe.*
Solicitors for respondents: *William A. Crump & Son.*

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the Lord Curzon Steamship Co., Ld., is a valid and subsisting contract, and the plaintiff is now and has at all times since December 18, 1919, been entitled' to full performance of said time charterparty by the defendants the Lord Strathcona Steamship Co., Ld. 2. That plaintiff is entitled to recover from defendants the Lord Strathcona Steamship Co., Ld., all amounts paid by plaintiff to defendants the Lord Strathcona Steamship Co., Ld., in excess of the amounts which plaintiff should pay under the provisions of said time charterparty with interest thereon at the rate of five per centum per annum from the respective dates of payment to date of this order" (this clause then appointed a referee to assess the amounts recoverable). 4. That plaintiff is entitled to recover against defendants the Lord Strathcona Steamship Co., Ld., any damages sustained by plaintiff by reason of the failure, refusal or neglect of defendants the Lord Strathcona Steamship Co., Ld., to carry out the terms of said time charterparty, said damages to be assessed before the said referee. 6. That plaintiff is to be at liberty to enter judgment against defendants the Lord Strathcona Steamship Co., Ld., for the amounts certified by the referee under cl. 2 hereof, and the amount of said damages under cl. 4 hereof, when assessed, and the plaintiffs' costs of action when taxed. 7. That defendants the Lord Strathcona Steamship Co., Ld., its officers, directors, managers, servants, and agents be and it is and they are hereby restrained from employing or using or allowing to be employed or used the said steamship *Lord Strathcona* in any way inconsistent with or different from the employment and use provided for in said time charterparty during the existence of said time charterparty."

[PRIVY COUNCIL.]

J. C.* 1925 Nov. 19.

CHESTERMAN AND OTHERS . . . . APPELLANTS;

AND

FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia — Taxation — Estate Duty — Exemption — "Charitable purpose" — Estate Duty Assessment Act, 1914–1916, *s.* 8, *sub-s.* 5.

The Estate Duty Assessment Act, 1914–1916, of the Commonwealth of Australia, by s. 8, sub-s. 5, exempts from the payment of estate duty so much of an estate as is bequeathed "for religious, scientific, charitable or public educational purposes."

A testator bequeathed the residue of his estate upon trusts under which prizes were to be awarded to various classes of persons, military, naval and civil, of both sexes, the merit of the candidate to be ascertained by various physical, moral and literary tests:—

Held, that in the above sub-section the word "charitable" was used in its technical legal sense, and not with the narrower meaning of "eleemosynary," which it has in popular language; and that, accordingly, the residue of the estate was exempt from estate duty. It was not necessary to decide whether the bequest was also for "public educational purposes."

Judgment of the High Court reversed.

APPEAL (No. 25 of 1925) by special leave from a judgment of the High Court of Australia (June 6, 1923), answering certain questions on a case stated, and from a judgment of the same Court (November 6, 1923), whereby, in accordance with the answers, the Court dismissed an appeal by the present appellants against an assessment under the Estate Duty Assessment Act, 1914–1916, of the Commonwealth.

The question in the appeal was whether a fund bequeathed in certain trusts by P. S. Mitchell, deceased, was exempt from estate duty by virtue of s. 8, sub-s. 5, of the above Act.

The facts of the case and the terms of the above sub-section appear from the judgment of the Judicial Committee.

The High Court of Australia, upon a case stated, held by

* *Present:* LORD DUNEDIN, LORD SUMNER, LORD WRENBURY, LORD DARLING, and LORD SALVESEN.

a majority (Isaacs, Rich and Starke JJ.; Knox C.J. and Higgins J. dissenting) that the bequest in question was not exempted under the sub-section. The judgment is reported at 32 C. L. R. 362.

1925. Nov. 2. *W. A. Greene K.C.* and *Harman* for the appellant, referred to *Commissioners of Income Tax* v. *Pemsel* (1); *Attorney-General for New Zealand* v. *Brown* (2); *Cocks* v. *Manners* (3); *Dunne* v. *Byrne* (4); *Hoare* v. *Hoare* (5); *Inland Revenue Commissioners* v. *Scott* (6); *Thompson* v. *Thompson* (7); *Farrer* v. *St. Catherine's College* (8); *In re Mariette.* (9)

Hon. Geoffrey Lawrence K.C. for the respondent referred to *Inland Revenue Commissioners* v. *Forrest* (10) and *Whicker* v. *Hume* (11), in addition to cases mentioned above.

Nov. 19. The judgment of their Lordships was delivered by

Lord Wrenbury. This is an appeal by special leave from an order of the High Court of Australia dated June 6, 1923, and from an order of the same Court dated November 9, 1923, whereby the Court dismissed an appeal by the appellants, the executors of Peter Stuckey Mitchell, against an assessment made by the respondent on the appellants under the Estate Duty Assessment Act, 1914–1916, of the Commonwealth of Australia in respect of estate duty claimed to be payable to the respondent by the executors in respect of a certain portion of the estate.

The question is as to the true meaning and construction of the word "charitable" in s. 8, sub-s. 5, of the Act, which is as follows: "(5.) Estate duty shall not be assessed or payable upon so much of the estate as is devised or bequeathed or passes by gift inter vivos or settlement for religious, scientific, charitable or public educational purposes."

(1) [1891] A. C. 531.
(2) [1917] A. C. 393.
(3) (1871) L. R. 12 Eq. 574.
(4) [1912] A. C. 407.
(5) (1886) 56 L. T. 147.
(6) [1892] 2 Q. B. 152.
(7) (1844) 1 Coll. C. R. 381.
(8) (1873) L. R. 16 Eq. 19.
(9) [1915] 2 Ch. 284.
(10) (1890) 15 App. Cas. 334.
(11) (1858) 7 H. L. C. 124.

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There is nothing further in the Act relevant to the question for decision, unless it be found in s. 8, sub-s. 8, which is as follows: "(8.) In this Act, 'public educational purposes' includes the establishment or endowment of an educational institution for the benefit of the public or a section of the public."

The testator by his will bequeathed the residue of his estate upon trusts under which prizes were to be awarded to various classes of persons, military, naval and civil, and of both sexes, the merit of the candidate to be ascertained by various physical, moral and literary tests. The provisions of the will are very voluminous. It is unnecessary to set them out here at length. Their Lordships find this statement of their general nature sufficient for the present purpose. These trusts are in the will and codicils referred to as the "Peter Mitchell Trust."

The appellants have obtained an order from the Equity Court of the State of New South Wales on an originating summons taken out by them for the purpose of deciding the question whether the gift of the Peter Mitchell Trust was a valid charitable gift. This order decides that the Peter Mitchell Trust is valid for all purposes. This is not disputed before their Lordships. The question for decision is whether within the language of the above section of the Act the Peter Mitchell Trust is "for charitable purposes" and consequently exempt from estate duty, or whether it is for "public educational purposes" and exempt upon that ground.

The question as stated in the case for the opinion of the Full Court of the High Court of Australia was: "Question (1.). Is the part of the estate referred to in the said case stated which is subject to 'The Peter Mitchell Trust' property devised or bequeathed to (sic) religious, scientific, charitable or public educational purposes within the meaning of the Estate Duty Assessment Act, 1914–1916, Section 8 (5.)?" The order under appeal answered this question in the negative. The executors appeal.

The appellants contend that the word "charitable" in the

Act bears its technical legal meaning as in the statute of Elizabeth. The respondent contends that it bears its popular meaning, which involves the idea of assisting poverty or destitution and which may perhaps be expressed by the word "eleemosynary."

In approaching this question the starting point is found in *Pemsel's* case (1) in the House of Lords, and in Lord Macnaghten's words (2): "In construing Acts of Parliament it is a general rule . . . . that words must be taken in their legal sense unless a contrary intention appears." In looking to see whether in this Act a contrary intention appears their Lordships find nothing to assist them in s. 8, sub-s. 8. That sub-section does no more than enlarge (if indeed it were required for that purpose) the meaning of the words "public educational purposes" in s. 8, sub-s. 5. It remains to consider the words of s. 8, sub-s. 5. Upon those words the argument is that the word "charitable" is found in a context from which it is to be inferred that it bears the popular and not the technical meaning; that it bears the meaning and is limited to the meaning which involves the idea of relief from poverty; that it means eleemosynary; that it does not bear the legal meaning expressed by Lord Macnaghten in *Pemsel's* case (3) by the words "trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." It is contended that the word if construed in the legal sense is either pleonastic in that it is redundant and is not required to express the idea intended to be conveyed, or is tautologous, and is a needless repetition of something that is said elsewhere. Their Lordships do not find this argument to be well founded. Take, for instance, the first word "religious." It is not all religious purposes that are charitable. Religious purposes are charitable only if they tend directly or indirectly towards the instruction or the edification of the public: *Cocks* v. *Manners*. (4) The word

(1) [1891] A. C. 531.
(2) Ibid. 580.
(3) [1891] A. C. 531, 583.
(4) L. R. 12 Eq. 574, 588.

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"charitable" in the Elizabethan sense covers a wider field than the word "religious." To express the point in few words, the word "charitable" in the Elizabethan sense is larger and more comprehensive than the other words in the context. It includes, no doubt, the subject matters expressed by those other words, and in that sense may be said to be redundant if understood in the technical sense in that it is repetition. But it adds something to those words. There is overlapping, no doubt, but if it be read in its popular sense there is also overlapping. The four words are not mutually exclusive. As Lord Herschell said in *Inland Revenue Commissioners* v. *Scott* (1), little weight is to be attached to the mere fact that specific exemptions are found which would be covered by the wider general word. Take, for instance, the word "religious." If the purpose were religious but not charitable, it would, under this Act, be exempt. If it were charitable but not religious it would equally be exempt. The words in *Inland Revenue Commissioners* v. *Forrest* (2) approach very nearly to the words in the present case. Their Lordships find nothing in *Attorney-General for New Zealand* v. *Brown* (3) which conflicts with the view they are here expressing. The decision there was that the gift was to be construed as though the word "and" were "or," so that the words would be "charitable or benevolent or religious, etc."; that the fund might have gone to "benevolent" purposes which were not "charitable," and that consequently the gift was not a good charitable gift.

A further argument was addressed to their Lordships upon the words "public educational purposes" to the effect that exemption could be claimed upon those words, let the meaning of "charitable" be what it will. Their Lordships do not find it necessary to express any opinion upon this point. The appellants, in their judgment, succeed upon the word "charitable." It is not necessary to go further.

It results that the appeal must be allowed, and the question set out in the commencement of this judgment must be

(1) [1892] 2 Q. B. 152, 165. (2) 15 App. Cas. 334.
(3) [1917] A. C. 393.

answered in the affirmative and the matter remitted to the High Court of Australia so to modify the order of November 9, 1923, as to give effect to that answer. The appellants must have their costs in the Courts of Australia and before this Board. Their Lordships will humbly advise His Majesty accordingly.

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Solicitors for appellants: *Sharpe, Pritchard & Co.*
Solicitors for respondent: *Coward, Chance & Co.*

[PRIVY COUNCIL.]

VRASAPILLAI GABRIEL . . . . . APPELLANT;

AND

A. S. ELIATAMBY AND ANOTHER . . . RESPONDENTS.

J. C.* 1925 *July* 7.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Divorce—Evidence of Adultery—Evidence against Co-respondent—Undelivered Letters from Wife—Ceylon Evidence Ordinance (No. 14 of 1895), s. 9.

In a suit by a husband for divorce, letters written by the wife to the co-respondent, but not delivered to him, are not made evidence of adultery admissible against the co-respondent by s. 9 of the Ceylon Evidence Ordinance, 1895. The fact that the co-respondent's counsel has based questions in cross-examination upon the contents of the letters, which had properly been admitted as evidence against the wife, does not make the letters evidence against the co-respondent.

Judgment of the Supreme Court reversed.

APPEAL (No. 97 of 1924) from a decree of the Supreme Court of Ceylon (December 19, 1923) reversing, so far as it related to the present appellant, a decree of the District Judge of Colombo (May 28, 1923).

In a suit brought by the first respondent the District Court dissolved his marriage with the second respondent, but dismissed from the suit the appellant, who was the co-respondent, upon the ground that there was no evidence

* *Present:* VISCOUNT HALDANE, LORD BLANESBURGH, and LORD DARLING.

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of adultery admissible against him. Both the present respondents appealed to the Supreme Court. That Court reversed the decision of the District Judge, so far as it related to the appellant, and ordered him to pay Rs.5000 damages.

The facts appear from the judgment of the Judicial Committee.

1925. June 12, 15. *De Gruyther K.C.* and *T. Bucknill* for the appellant referred to *Hay* v. *Gordon* (1); *Allen* v. *Allen* (2); *Rutherford* v. *Richardson* (3); *Miller* v. *Babu Madho Das* (4); and to the Ceylon Evidence Ordinance, 1895.

Cotes-Preedy K.C. for the first respondent contended that apart from the wife's letters there was sufficient evidence to support the decree against the appellant.

July 7. The judgment of their Lordships was delivered by

LORD DARLING. This is an appeal from a decree of the Supreme Court of the Island of Ceylon dated December 19, 1923, setting aside a decree of the District Judge of Colombo dated May 28, 1923, so far as it related to the appellant, and further decreeing that the appellant do pay to the first respondent the sum of Rs.5000 as damages.

The questions for determination in this appeal are whether the evidence proves that the appellant has committed adultery with the second respondent and whether certain matters admitted as evidence were rightly so admitted.

On May 31, 1922, the first respondent instituted a suit in the District Court of Colombo praying that his marriage with the second respondent might be dissolved on the ground of her alleged adultery with the appellant, and that the appellant be ordered to pay the sum of Rs.50,000 as damages to the first respondent in respect of the alleged adultery.

The second respondent filed an answer dated August 2, 1922 (inter alia), denying the allegation of adultery. This answer she withdrew on October 11, 1922. The appellant had filed an answer dated July 26, 1922, denying the allegation of adultery.

(1) (1872) 10 Ben. L. R. 301.
(2) [1894] P. 248.
(3) [1923] A. C. 1.
(4) (1896) L. R. 23 I. A. 106, 116.

The following issues were framed at the trial by the District Judge: (1.) Did the second defendant (appellant) commit adultery with first defendant (second respondent) on various occasions between July 29, 1920, and February 11, 1922? (2.) If so, what damages (if any) is plaintiff (first respondent) entitled to?

The second respondent was not called as a witness, and the District Judge, having heard all the evidence, was of opinion that there was no evidence of adultery against the appellant or evidence from which adultery could be inferred, even if he accepted as true the evidence of the witnesses called on behalf of the first respondent.

The District Judge found that there was evidence of adultery against the second respondent consisting of: (1.) A verbal admission made by her to the first respondent on February 10, 1922; (2.) Letters in her handwriting and addressed to the appellant, but not delivered to him. He pronounced a decree dissolving the marriage, dismissed the action as against the appellant, and ordered the first respondent to pay the appellant's costs.

The wife's admission was made on February 10, 1922, in the presence of the appellant at a time when she was drunk and violent, and the appellant, both as a doctor and a friend, had been sent for to attend her. The first respondent did not then separate from the second respondent and continued to live with her till the institution of the suit.

The letters are all subsequent in date to the interview at which the admission was made and to the adultery alleged, and were never received by the appellant. They are alleged to have been given to the first respondent's motor-car driver for transmission to the appellant, but they were in fact given by the motor driver to the first respondent. There is in one letter internal evidence that the second respondent knew that these letters were not reaching the appellant.

The appellant is a medical practitioner and a married man and had visited the house of the first respondent, not professionally but as a friend, over the period during which adultery is alleged to have been committed.

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Both the first respondent and the appellant appealed to the Supreme Court and that Court dismissed the appeal of the appellant, and on the appeal of the first respondent reversed the decision of the District Judge so far as it related to the appellant, and found that he had committed adultery with the second respondent.

The Chief Justice of the Supreme Court held that: (1.) The evidence, apart from the confession and letters, was not of such a character that the District Judge was bound to find adultery; and (2.) That the confession was not in itself evidence against the appellant, but relevant only to judge of the conduct of the appellant upon that confession; but (3.) That the letters were evidence against the appellant either: (*a*) As having been "put in" by his counsel at the trial, or (*b*) By virtue of the Evidence Ordinance of Ceylon.

The learned puisne justice of the Supreme Court agreed with the Chief Justice as to the admissibility of the letters, but he held also that the evidence against the appellant, even apart from the letters, was amply sufficient to justify a finding against him.

The Supreme Court further ordered the appellant to pay to the first respondent the sum of Rs.5000 in respect of the alleged adultery, and said the damages were awarded for the purpose of expressing the reprobation of the Court and society.

From the decree of the Supreme Court the appellant has appealed to His Majesty in Council, and submits that it should be set aside and the decree of the District Judge restored with costs.

The decree against the second defendant, Celia Eliatamby, is based upon the evidence of her own admission of adultery, and upon the above letters written by her which contain admissions to the same effect. Whether that admission or these letters constitute sufficient proof of adultery even on the part of the second defendant is a question which their Lordships need not further pursue, for against this decree there is no appeal.

As to the appellant their Lordships, after carefully considering all the evidence in the case, agree with the District Judge

and the Chief Justice, that apart from the admission of Mrs. Eliatamby and the letters addressed by her to the appellant, but never delivered to him, there is not sufficient evidence to prove him guilty of adultery with her.

With regard to the verbal admission of adultery made by Celia Eliatamby, when drunk, in the presence of the appellant, their Lordships are of opinion that it is not evidence against the appellant for any purpose whatever.

It now remains to consider the question whether the woman's letters are for what they are worth legal evidence against the appellant. As to this their Lordships are of opinion that none of the sections of the Evidence Ordinance in force in Ceylon apply in such a way as to affect the ordinary rules of evidence by which this particular matter must be decided. These letters were put forward as an essential part of the case against the appellant, were as a series opened by counsel for the plaintiff, and he actually read all but two of them to the Court. To this course, as the Chief Justice observes, it was impossible for the appellant's counsel then to object, for they were evidence against their writer, the second respondent. But that counsel in the trial Court and in the Supreme Court contended that they were not admissible as evidence against his client, and this was in the trial Court admitted by counsel for the plaintiff to be so.

The letters having been read as part of plaintiff's case, and being clearly admissible against the defendant, Celia Eliatamby, as against whom they were tendered, it is contended that notwithstanding plaintiff's counsel's admission to the contrary, on the basis of which the trial proceeded, they became evidence against the present appellant by reason of his counsel having in cross-examination founded questions upon them, and this contention the Supreme Court has held to be well founded. In the words of the Chief Justice: "As soon as these letters were used by the defence for the purpose of challenging the plaintiff's honour and bona fides they became part of the case between these two parties for all purposes. They were 'in' as between these two parties." In this view their Lordships cannot concur. Before the defendant's

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counsel asked a single question regarding them they were "in" as part of the plaintiff's own case, and, therefore, questions and arguments might properly be founded upon them without in any way adopting them as part of the evidence produced on behalf of this appellant—for appellant's counsel had a right to rebut that case, and to destroy it, by means of its own component material. There is no identity or analogy, as suggested in argument, between this case and one in which a defendant's counsel makes evidence against his client of a document not already put in, by asking questions on its assumed contents—which questions then lead to its necessary production. There he brings in a fresh document, but these letters, although not all read, were all treated as put in by the plaintiff's counsel. A man does not draw his sword upon another if, being menaced, he snatches the weapon from an assailant's hand, and strikes him with it.

The Chief Justice relied on the Evidence Ordinance, s. 9, as making these letters evidence, because it declares that facts "which show the relation of parties by whom any fact in issue was transacted are relevant." And he observed that "it is difficult to see how it can be said that these letters do not show the relation of the parties to this interview." But it is precisely because the ex parte statement of one person made in the absence of the other whom it concerns does not show the relation of the parties, especially in regard to a third party (but merely amounts to a version by one of them possibly false), that the law of England excludes such statements as hearsay—as not being evidence.

The Chief Justice gave his view as to the effect of the Evidence Ordinance, and in this their Lordships regret to be entirely unable to concur. He came to the conclusion that the Evidence Ordinance—which is merely the application to Ceylon of the Indian Evidence Act—had practically swept away all the English law relating to hearsay. Were this so the consequences must long ago have been manifest in the decisions in the Courts of India, and in those of the Judicial Committee of the Privy Council, yet in 1872, the very year of the passing of the Indian Evidence Act, it was laid down

in *Hay* v. *Gordon* (1) that "No statements of Mrs. Gordon" (the respondent in divorce), "written or verbal, are, according to well-known principles of law, admissible against Lord William Hay" (the co-respondent). Their Lordships have been unable to find any authority for the contention that since that case was decided any other rule has prevailed in the Indian Courts.

The Chief Justice himself had no doubt as to the revolutionary consequences of his decision, for he used these words: "I am conscious that by bringing the letters under this head I am in fact laying down that any intercepted correspondence between the respondents in divorce cases may be considered as evidence against the person to whom it is addressed, and I appreciate the danger of this latitude, but our duty is to interpret the words of the section."

In their Lordships' opinion no words of the section compel to such a conclusion. The words of the Ordinance in this regard are precisely those of the Indian Evidence Act, and, therefore, were they to be construed as the Supreme Court has now held that they should, the same reversal of the well understood principles of English law as are applicable in such cases as this would have been accomplished in India as well as in Ceylon. The principle is one so reasonable in itself, fundamental and so long established, that their Lordships cannot conceive of its being overthrown and discarded except designedly, and by words so plain that their meaning would be open to no manner of doubt.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, the judgment of the District Judge of Colombo in favour of the appellant restored, and that the appellant should have the costs of this appeal and in the Courts below.

Solicitor for appellant: *O. A. Caley.*
Solicitors for first respondent: *Freeman & Cooke.*

(1) 10 Ben. L. R. 301, 308.

[PRIVY COUNCIL.]

J. C.*
1925
Nov. 24.

THE KING . . . . . APPELLANT;

AND

ANDERSON LOGGING COMPANY, LIMITED . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (British Columbia)—Income Tax—Company's Sale of its Assets—Realized Profit—Supplementary Assessment—Income and Personal Property Taxation Act, 1921 (*Stat. of B.C. No.* 48 *of* 1921), *s.* 65, *sub-s.* 1.

In 1910 the respondent company bought timber limits in British Columbia for $87,500. In 1920 they sold them at a price per 1000 feet with a guaranteed minimum price of $180,000, to be paid as to $80,000 at once and the balance by two payments in January, 1921 and 1922; a clear title was to be given on the $180,000 being paid. In an "undivided profits account" for 1921 the company entered $130,001 as "profits on sale of capital assets transferred to the balance of shareholders' accounts," that sum being the auditor's estimate of the profit of the whole transaction when completed. The company in making a return for income tax under the Income and Personal Property Taxation Act, 1921, of British Columbia, contended that the sum represented increase of capital value and was not income. A supplementary assessment was made upon the company in 1923 under s. 65, sub-s. 1, of the Act which included the $130,001. The Courts in British Columbia upheld the assessment, but it was reduced by the Supreme Court of Canada to $66,269. It was admitted in the course of the case that that sum was the amount of two payments of price in 1921 and 1922, after the expenses of purchase and of working the company had been discharged. The taxing authority appealed; there was no appeal by the company:—

Held, that the company was not assessable at $130,001, as that sum was merely a contingent estimate; but that a supplementary assessment of $66,269 could be made under s. 65, that sum being, upon the admission, the profit realized during the period to which the assessment related.

Commissioner of Taxes v. *Melbourne Trust* [1914] A. C. 1001 applied.

Judgment of the Supreme Court of Canada affirmed.

APPEAL by special leave from so much of a judgment of the Supreme Court of Canada (December 1, 1924) as varied a judgment of the Court of Appeal of British Columbia (June 4, 1924).

The judgment of the Court of Appeal had affirmed a

* *Present:* LORD DUNEDIN, LORD SUMNER, LORD WRENBURY, LORD DARLING, and LORD SALVESEN.

judgment of the Revision Court Judge of Vancouver, whereby a supplementary assessment for income tax at $130,966·60 made upon the respondent company under s. 65, sub-s. 1, of the Income and Personal Property Taxation Act, 1921, of British Columbia, had been confirmed. Of that sum $130,001·08 was alone in dispute. The effect of the variation by the Supreme Court was to reduce the amount to $66,269·28.

The facts and the terms of s. 65, sub-s. 1, of the above Act appear from the judgment of the Judicial Committee. Sect. 2, sub-s. 1, and s. 36, sub-s. 1, so far as they are material, appear in the footnote. (1)

1925. Oct. 29. *Owen Thompson K.C.* and *Sandlands* for the appellant. The sum of $130,001·08 having been dealt with by the company in its balance sheet of 1921 as a profit, and being the source out of which a dividend was declared, constituted taxable income for the year. The company had in effect a charge upon the timber limits for the payment of $180,000, so that the fact that part of that sum had not been received is not material. Sect. 65, sub-s. 1, is by its terms retrospective. [Reference was made to *Commissioner of Taxes* v. *Melbourne Trust* (2); and *Granby Consolidated Mining, etc., Co.* v. *Attorney-General for British Columbia.* (3)

Hon. Sir Malcolm Macnaghten K.C. and *T. Mathew* for the respondents. The income received by the company in 1920 was not "liable to taxation for the current year or any

(1) Sect. 2, sub-s. 1: "In this Act, unless the context otherwise requires, 'Income' includes the gross amount earned, derived, accrued or received from any source whatsoever, the product of capital, labour, industry or skill; and includes all wages, salaries, emoluments and annuities accrued due from any source whatsoever . . . . and includes all income, revenue, rent, interest or profits arising, received, gained, acquired, or accrued due from bonds, notes, stocks, debentures, or shares . . . . or from real and personal property, or from money lent, deposited, or invested, or from any indebtedness received by deed, mortgage, contract, agreement or account, or from any venture, business, or profession of any kind whatsoever. . . . ."

Sect. 36, sub-s. 1: "The tax on income shall be assessed, levied, and paid annually upon the net income of the taxpayer during the next preceding calendar year. . . . ."

(2) [1914] A. C. 1001, 1011.

(3) [1923] A. C. 247.

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previous year" within the meaning of s. 65, sub-s. 1, of the Act. The Act is not retrospective; no assessment in respect of income received in the year 1920 could validly be made under the Act.

Nov. 24. The judgment of their Lordships was delivered by

LORD DUNEDIN. The respondent company were incorporated in 1907. In 1910 they purchased certain timber limits at the price of $87,500, which was calculated on the probable yield of timber at $1 per 1000 feet. In 1917 they sub-sold part of the timber on a bargain which need not be particularly specified, as it was afterwards superseded by another bargain in 1920. The only relevancy of the matter is that a certain amount of timber was cut and payments made under the agreement of 1917. In 1920 the final bargain was made by which the whole of the timber limits belonging to the company were sold at the rate of $4 per 1000 feet. A minimum payment of $180,000 was guaranteed, and when $180,000 had been paid a clear title to the whole was to be given to the purchaser. The $180,000 was to be paid as follows: $80,000 on the date of contract. On January 15, 1921, at least $50,000, or such greater sum as was represented by the $4 rate of timber by then cut, and the remaining $50,000 not later than January 15, 1922. The purchaser entered upon the limits and proceeded to cut. No dividends were paid by the company in the earlier years, as the expenses of the company more than swallowed up the comparatively small payments made under the earlier agreement of 1917.

On December 31, 1917, the company published a balance sheet and profit and loss account. The profit and loss account showed a loss on that year of $2317·82. The balance sheet showed a balance of $26,560·48. In that year a small dividend had been paid.

In 1918 there was another balance sheet. It seems to have occurred to the company that, as timber was rising in value, they were really in a good position and should show that in their balance sheet. Accordingly, in the balance sheet, starting with the old balance of $26,560·48, they added a

sum of $131,250 as increase in value of timber between 1910 and 1913. This was a purely estimated sum, because, at that time, the rest of the timber had not been sold, and the sum realized on the contracts of 1917 had been only just enough to meet the current expenses and the dividend paid in 1917. In the profit and loss account this sum of $131,250 was dealt with as a cross-entry. This method of calculation disappeared in the balance sheets and profit and loss accounts of the next years, but in 1921 a change occurred. No further dividend had been paid and, as it was evident that, under the contract of 1920, there was going to be a substantial profit, it was thought that it was time that something should be paid. Accordingly instructions were given to the auditor that he should remodel the balance sheet and, taking the original cost price of $1 per 1000 feet and the sale price of $4 per 1000 feet, should endeavour to show how matters really stood. He accordingly remodelled the accounts and, taking what had been paid, he made out that two sums (corresponding to the two great divisions of the timber limits) of $15,564·92 and $34,434·00 respectively calculated on the original cost, still remained unpaid. Assuming this to be finally paid off he calculated profit on the whole transactions when finished at $130,001·08, and he drew up a document called "undivided profits account" in which he showed that figure. Upon that a dividend was declared of $25,000.

Now the company had to fill up the usual form to declare their income for the year 1921. This was done in February, 1922, in obedience to an Act which was passed in December, 1921. The company took the view that the whole profit on the transactions was merely an enhancement of capital and not a profit liable to income tax at all, and consequently that no return fell to be made. The taxing authorities resisted this view and contended that the company fell to be taxed on the sum of $130,001·08 above mentioned. The Commissioner made a supplementary assessment to that effect. This question was decided adversely to the company by the Revision Judge of the Vancouver Assessment District.

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His judgment was affirmed by the Court of Appeal of British Columbia. Appeal being taken to the Supreme Court of Canada, that Court affirmed on the main question in a long and careful judgment, but, at the end of that judgment, they added the following sentence: "For these reasons, the profits now in question were assessable in the years in which they were realized; but the statute of 1921, having obviously no retrospective operation, gave no authority to the assessor to make any assessment in respect of money received before the enactment was passed, and the assessment must be reduced accordingly to $66,269·28. As the appellant company achieves a substantial success, it is entitled to its costs throughout."

Appeal against that reduction has now been taken by the taxing authority to the King in Council. No cross-appeal was taken by the company. It may here be as well to say that their Lordships have not the slightest doubt that the judgment of the Supreme Court on the main question was right, being indeed entirely in conformity with *Commissioner of Taxes* v. *Melbourne Trust* (1), decided by this Board.

Now, the section of the statute on which the assessment was made is s. 65, sub-s. 1, and is as follows: "Where subsequent to the completion of any assessment roll, the assessor finds that any personal property or income or bank was liable or has become liable to taxation for the current year or any previous year, but has not been assessed on the roll or on any assessment roll for that previous year, he shall assess and tax the same on a supplementary assessment roll, or further supplementary assessment roll, for the current year, to be prepared by him from time to time; or where, subsequent to the completion of any assessment roll, the assessor finds that any personal property or income or bank has been assessed and taxed for less than the amount for which it was liable to assessment and taxation, he shall assess and tax the same on a supplementary roll, or further supplementary roll, for the balance of the tax, and in each case the assessment shall be made at the rates of taxation and subject to the

(1) [1914] A. C. 1001.

conditions of assessment governing the roll on which the same should have been assessed."

The figure of $66,269·28 to which the amount was reduced is not apparent in any of the balance sheets, but seems to have been matter of admission. In the factum for the present respondents, then appellants, which was before the Supreme Court it is set out that $80,000 was paid on the date of the contract, that $40,000 was paid in 1921, and that $26,269·28 was paid in 1922. It thus became apparent that it was matter of admission that these two sums had been paid in the period embraced in the assessment laid on in 1922, and it was admitted by the respondents' counsel that the main point being decided against him, they represented profit, or, in other words, that the expenses of purchase and other expenses of working the company had been wiped off before these sums were paid. Now on the figures thus brought out their Lordships consider it unnecessary to decide the question argued before them whether the statute is in every sense retrospective or not, because on the merits and apart from any such question, their Lordships think that the decree of the Supreme Court was clearly right. The $66,269·28 is taxable because it is now, the main question being decided, admitted to be profit. The $130,001·08 is not taxable because it was merely an estimate conditional on the eventual payment of the whole sums that would become due under the agreement of 1920.

Their Lordships would here refer to what was said by this Board in the case already cited: "As regards the question of when a profit is earned, their Lordships' view is that a profit can be said to be earned when it is dealt with as a profit. In ordinary cases this synchronises with the realization of the sums which swell the assets of the person or company, and entering the account (whether on the creditor or debtor side will depend on the particular account in view), go to bring out the balance which is deemed profit. But for the reasons already given their Lordships think that in a case like this the company are entitled to hold at least a part of their realization in suspense—as indeed they have done in their

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accounts—and that it is only when finally the same is given to the shareholders that the final impress of profit is, so to speak, stamped upon it, and therefore, for the purposes of the Act, that is the time at which it is earned."

The emphasis in this passage is on the word "realization." Each case depends on its own circumstances. But here their Lordships consider that the sum of $130,001·08 was only a mere estimate necessarily contingent on the sums due by the purchaser being eventually paid. These sums have not yet been all paid. The mere expression that the profit will go to the shareholders cannot be and is not enough. It is like the part kept back, referred to in the quotation just made. The $25,000 dividend was a realized profit and would have been taxable as such were it not that the admission made carries more than $25,000. It is further to be noticed that the Crown is not in any way really prejudiced, for when the sums as yet unpaid come to be paid, they will, on the admission made, be reckoned as assessable income.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellant: *Gard, Lyell, Betenson & Davidson.*
Solicitors for respondents: *Linklaters & Paines.*

[PRIVY COUNCIL.]

BRITISH PETROLEUM COMPANY, LIMITED . . . . . } APPELLANTS;

AND

ATTORNEY-GENERAL FOR CEYLON . RESPONDENT.

J. C.*
1925
Dec. 10.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Shipping—Compulsory Pilotage—Ship grounding in Colombo Harbour —Claim against Government—Ceylon Ordinance No. 4 of 1899, s. 11.

The appellants brought an action against the Government of Ceylon to recover for damage caused to their steamship by grounding in Colombo harbour in a berth to which she had been taken by a Government pilot. The Government is the harbour authority, and charges dues for taking ships into the harbour, a pilot being compulsory under Ceylon Ordinance No. 4 of 1899. By s. 11 of the Ordinance: "The Governor or the owner or master of a ship shall not be answerable for any loss or damage occasioned by the fault or incapacity of any pilot acting in charge of that ship within any port under the operation of this Ordinance." The Judicial Committee found that the berth was not unsafe, and that the grounding was due to negligence in mooring the ship, and:—

Held, that the action failed, since if there was any contract by the Government it was merely that the berth was a safe one, and if the pilot was responsible for mooring the ship, the Government was exempt from liability for his negligence by s. 11 of the Ordinance.

It was not necessary to decide whether in Ceylon the Crown can be made liable in tort under Roman Dutch law; but having regard to the considered decision of the Supreme Court of Ceylon in *Colombo Electric Tramway Co.* v. *Attorney-General* (1913) 16 New L. R. 161, and inasmuch as the question in Ceylon is whether any particular part of Roman Dutch law has been recognized there, very clear arguments would be required to induce the Judicial Committee to reverse that decision.

Judgment of the Supreme Court affirmed.

APPEAL (No. 146 of 1924) from a judgment of the Supreme Court of Ceylon (February 27, 1924) reversing a judgment of the District Court of Colombo (March 19, 1923).

The appellants brought an action against the respondent, representing the Government of Ceylon, to recover damages in respect of injury caused to their steamship *British Ensign*

* *Present:* LORD DUNEDIN, LORD SUMNER, and LORD WRENBURY.

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owing to her having grounded in Colombo harbour in a berth allotted to her by the harbour authorities.

The facts appear from the judgment of the Judicial Committee.

The trial judge gave judgment for the plaintiffs, but an appeal to the Supreme Court (Bertram C.J. and Ennis J.) was allowed and the action dismissed.

1925. Nov. 10, 12, 13, 16. *Miller K.C.*, *Porter K.C.*, *Bisschop* and *J. S. Lindsay* for the appellants.

Raeburn K.C. and *Hon. Stafford Cripps* for the respondent. In addition to cases mentioned in the present judgment reference was made to *Liebigs Extract of Meat Co.* v. *Mersey Docks and Harbour Board* (1); *Holman* v. *Irvine Harbour Trustees* (2); *Parker* v. *North British Ry.* (3); *Shaw Savill and Albion Co.* v. *Timaru Harbour Board* (4) and *Fowles* v. *Eastern and Australian Steamship Co.* (5); also to the Merchant Shipping Act, 1894, s. 633, and to the following Ordinances of Ceylon: No. 6 of 1865, s. 6 (and rules made thereunder); No. 17 of 1869, s. 17; No. 4 of 1899, ss. 3 to 7, 10, 11, 13.

Dec. 10. The judgment of their Lordships was delivered by

LORD DUNEDIN. The ss. *British Ensign*, belonging to the plaintiffs and appellants, laden with benzine, arrived outside the harbour of Colombo, on a voyage from Rangoon to Suez for orders, on September 10, 1919. She needed bunker fuel and consequently wished to enter the harbour for that purpose. She signalled for a pilot and a pilot came off, who proceeded to put her into a berth in the harbour. She was moored to certain stationary buoys in the harbour. In all the manoeuvres required to place her in the berth she was under the charge of the pilot. She took in the fuel required, and next morning essayed to leave the berth. It was then found that she had taken the ground at the stern.

(1) [1918] 2 K. B. 381.
(2) (1877) 4 R. 406.
(3) (1898) 25 R. 1059.
(4) (1890) 15 App. Cas. 429.
(5) [1916] 2 A. C. 556.

After some ineffectual efforts to free her from the ground she was eventually got off at high tide and proceeded on her voyage. Before she started from the harbour, a perfunctory examination was made of her hull, so far as could be seen or felt by divers, and it was not thought that she had sustained any injury; but eventually, when she came to England and was dry-docked, it was found that her stern and some of the plates of her hull had been severely injured. The plaintiffs then raised the present action against the defendant, the Attorney-General for Ceylon—the Government of Ceylon being the harbour authority of Colombo—for the damage done.

The harbour of Ceylon is a roadstead which has been artificially turned into a harbour by the erection of breakwaters, which has converted it into a closed area of 640 acres. The erection of the breakwaters was effected under various Ordinances having the authority of law which constituted the Government the harbour authority and gave them rights and imposed duties. Under the Ordinances no vessel may enter without a pilot. When entered, she is directed to a berth and the pilot takes her there. A pilot also takes her away from the berth and out to sea. A tariff is charged, which varies according to services rendered and the size of the ship. It is not necessary to go into particulars, because it is common ground that the *British Ensign* in respect that she only entered for coaling (liquid fuel being held as equivalent to coal) and taking in water, fell to be charged a special consolidated rate of Rs.200 for a stay not exceeding ninety-six hours.

The so-called berths in the harbour are rectangular spaces which are marked by means of numbered buoys. The buoys at the part of the harbour, with which the case has to do, are placed in pairs, east and west, at a distance of 600 feet. The distance between each pair is 400 feet, and the line between each pair of buoys represents the middle line of a berth. In other words, each berth is represented by a parallelogram 600 by 400. The berth to which the *British Ensign* was sent was numbered No. 21 and the centre

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line buoys were marked, 43 being the eastmost and 33 the westmost respectively. After complaint was made and before the trial of the action, very minute inspection by divers was made of the place in which the ship had taken the ground. It then became apparent that in the neighbourhood of buoy 43 there was an irregular boomerang-shaped piece of rock such as would easily account for the injuries on the ship's bottom if she were allowed to rest on it.

The plaintiffs accordingly contend that by accepting a fee from them for the entry to the harbour and berthing of their ship, the harbour authority impliedly contracted to give the ship a safe berth; that the berth provided and to which the ship was compulsorily obliged to go was not safe, and consequently the harbour authority is liable in damages. The defendant, on the other hand, contends that no contract had been entered into by him or could be inferred against him by the mere taking of dues which, by Ordinance equivalent to statute, he was obliged to charge. Further, he said that the berth provided was, in fact, a safe berth for the ship, in the sense that a ship properly placed within the limits of No. 21 would be safe, but that the ship was improperly placed in respect that the soundings, which were well known to the pilot, indicated not indeed a rock, but a shallow patch where the rock was, and that a ship should not have been placed there. Further, he said that in any view, even if a contract was held against him, the failure to keep the ship safe was a tort, and the Government of Ceylon, which is just another name for the Crown, is not liable for torts; and, further, if with or without a contract the fault in putting the ship in an unsafe position was the fault of the pilot, he (the defendant) was specially excused by s. 11 of Ordinance No. 4 of 1899, which is in these terms: "11. The Governor or the owner or master of a ship shall not be answerable to any person whatsoever for any loss or damage occasioned by the fault or incapacity of any pilot acting in charge of that ship within the limits of any port brought under the operation of this Ordinance."

To this the plaintiffs replied that s. 11 had not the effect

contended for and that by Roman Dutch law the Crown is answerable in tort. The learned trial judge found for the plaintiffs. He found that in respect of the decision in such cases as *Parnaby* v. *Lancaster Canal Co.* (1); *Mersey Docks and Harbour Board* v. *Gibbs* (2); *The Moorcock* (3); *Francis* v. *Cockrell* (4); and *Lax* v. *Corporation of Darlington* (5), there was to be inferred a contract from the payment of the dues; that such contract was to provide a safe berth; and that the non-provision of a safe berth was a breach of contract and not tort. As to the latter point, he also founded on an obiter dictum in the judgment of this Board in *Scrutton & Sons* v. *Attorney-General for Trinidad.* (6) As to the Crown being free from liability in tort, the question in his view did not arise. Had it been so he would have been bound by the decision of the Court of Appeal in *Colombo Electric Tramway Co.* v. *Attorney-General.* (7)

Appeal being taken to the Supreme Court, this judgment was reversed, and the action dismissed. The Chief Justice held that there was no contract and discriminated the cases quoted on the point in respect that in them there was an invitation to the ship or to others to avail themselves of the services offered; whereas here the ship entered the harbour as of right, and what she paid was a mere due or toll and not a consideration for a contract. That being so, the fault which in fact he ascribed to negligent berthing by the pilot was a tort, and therefore the Crown was not liable, as in *Colombo Electric Tramway Co.* v. *Attorney-General* above quoted.

The other learned appeal judge rested his judgment upon a different ground. He was not inclined to say there might not be a contract. But the fault he held was the fault of the berthing pilot, and then, whether that fault was looked on as a breach of contract or a tort, in either case the Government was freed by the terms of s. 11.

(1) (1839) 11 A. & E. 223.
(2) (1864) L. R. 1 H. L. 93.
(3) (1889) 14 P. D. 64.
(4) (1870) L. R. 5 Q. B. 501.
(5) (1879) 5 Ex. D. 28.
(6) (1920) 90 L. J. (P. C.) 30.
(7) 16 New L. R. 161.

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Their Lordships were favoured with a careful and interesting argument on the various points of law which may be gathered from the contentions of the parties and the opinions of the learned judges above set forth. They think, however, that it is necessary first to come to a clear conclusion as to the facts, and it will then be apparent what points of law are necessary to be determined for the decision of the case.

There is no question but that the vessel in being berthed was entirely under the control of pilot Sorensen, and that he was directed by the master attendant, whose orders in that matter he was bound to obey, to place the vessel in berth No. 21. Now Sorensen, as all other pilots, was in possession of a chart showing the soundings all over the harbour and with this chart he was very familiar. That chart showed in the immediate neighbourhood of buoy 43, that is to say the eastmost or shoreward end of the berth, that there was what has been called a shallow patch. The exact extent of the patch he did not know, because the shallow patch was outside the 30-feet contour line, and the soundings which were shown individually are at distances of 50 feet from east to west and 200 feet from north to south. Within 100 feet to the north of 43 there was a sounding of 23·9 feet, and to the west of that two others of 23·3 and 24·3 respectively. After that, continuing to the west, came the contour line of 30 feet. The length of the *British Ensign* was 430 feet and her draught as she arrived at her moorings 25·6 forward and 24·10 aft. With the filling up of the oil, her draught aft would slightly increase. Sorensen was fully aware of the shallow patch and says he would not have placed the stern of the vessel over it. An examination of the position, in the light of the accurate soundings, showed that there was quite room to place a ship of the size of the *British Ensign* in the berth without its stern being over the shallow patch. As a matter of fact, Sorensen thought he had left the vessel clear of the patch. The ship is moored by an anchor to the west and by a cable from each of the two buoys. The buoy is capable of being pulled to a certain

extent towards the ship. What seems to have happened is that there was a mistake made, either by one of the ship's crew, unnoticed by Sorensen, or by Sorensen himself, as to how many shackles of chain were out from the ship towards the anchor. The result was that the ship was not pulled up sufficiently near to buoy 33, a position which would have cleared her stern from the shallow patch. All the pilots examined speak to the shallow patch. They all say that berth 21 was fit for a ship of the size of the *British Ensign* if properly placed, and this was not cross-examined to by the plaintiffs. The truth is that the plaintiffs rested their claim on the idea of a contract for a safe berth in fact, and considered that if the actual position to which the ship was conducted by the pilot, appointed by the harbour authority, turned out to be unfit they were entitled to succeed.

In this state of the facts, which is in accordance with the views of the Court below, it seems to their Lordships that it is quite unnecessary to decide many of the legal questions raised. In particular, they need not decide the question whether, looking to the position of the harbour authority as distinct from private persons owning a wharf or premises, there was a contract. Assuming that there was a contract, it would only be a contract to provide a berth to which it was safe to go. The ship was improperly moored therein. That was either the fault of the pilot or the ship's crew (if they moved the ship after the pilot left them). If it was the fault of the ship's crew it was not the fault of the respondent. If it was the fault of the pilot, then their Lordships hold that the harbour authority is excused by reason of s. 11, and that irrespective of whether the fault was breach of contract or a tort.

As to s. 11 their Lordships agree with the appellate Court. The words are absolute and without exception. There is nothing in the section to cut it down to questions only arising between the persons mentioned and persons not mentioned, excluding all questions which may arise between the persons mentioned inter se. Looking to the position of the harbour

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authority, who were not like a private trader catering for trade, but were obliged to furnish facilities, it is not a section which need cause surprise or excite anxiety to restrict its operation.

For these reasons their Lordships are of opinion that the appeal falls to be dismissed, and they give no opinion as to the general questions raised. They would, however, wish to remark that as to the question of whether the Roman Dutch law differs from the English in holding that the Crown may be liable for a tort, inasmuch as the matter has been often mooted and has been solemnly settled by the case of the *Colombo Electric Tramway Co.* v. *Attorney-General* (1), and inasmuch as the question in Ceylon is always not only what is Roman Dutch law, but how far has any part of it been recognized in Ceylon, they would require very clear arguments to induce them to reverse the Supreme Court on such a matter.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeal with costs.

Solicitors for appellants : *William A. Crump & Son.*
Solicitors for respondent : *Burchells.*

(1) 16 New L. R. 161.

pplied. Re KOENIGS- [1948] Ch. 727
IRG. IGSBERG; [1949] 1 Ch. 348

Observations of LORD SHAW, at p. 170, *applied.* WINNAN *v.* WINNAN. [1948] 2 All E.R. 862.

Distinguished. *Re* KOENIGSBERG *(decd.).* [1949] 1 All E.R. 804.

[PRIVY COUNCIL.]

HOYSTEAD AND OTHERS . . . . . APPELLANTS; J. C.*

AND 1925 Dec. 17.

COMMISSIONER OF TAXATION . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Estoppel—Estoppel by Judgment—Admission in previous Litigation—Matter fundamental to previous Judgment—Land Tax Assessment Act, 1910–1916 (*Aust.*), *s.* 38, *sub-s.* 7.

Under a will the annual income from an estate in Australia was divisible by the trustees between the testator's daughters. The trustees objected to an assessment for the financial year 1918–1919 under the Land Tax Assessment Act, 1910–1916, of Australia; they claimed under s. 38, sub-s. 7, of the Act a deduction of 5000*l.* in respect of the share of each daughter. A case was stated for the opinion of the Full Court of the High Court upon the questions: (1.) Whether the shares of the joint owners, or of any and which of them, in the land were original shares within s. 38; (2.) How many deductions of 5000*l.* the respondent should make. The Full Court answered these questions as follows: (1.) The shares of the six children surviving at the date of the assessment; (2.) Six. Judgment upon the objection was entered accordingly. Upon the assessment for 1919–1920 the Commissioner allowed only one deduction of 5000*l.*, contending that the beneficiaries were not joint owners within the meaning of the Act. Upon a case stated the Full Court upheld that view, and held that the Commissioner was not estopped by the previous decision:—

Held, that the Commissioner was estopped, since although in the previous litigation no express decision had been given whether the beneficiaries were joint owners, it being assumed and admitted that they were, the matter so admitted was fundamental to the decision then given.

Carter v. *James* (1844) 13 M. & W. 137 and *Howlett* v. *Tarte* (1861) 10 C. B. (N. S.) 813 explained.

Judgment of the High Court reversed.

APPEAL (No. 3 of 1925) by special leave from a judgment of the High Court of Australia in its appellate jurisdiction (November 2, 1923) affirming a judgment of Starke J. (October 16, 1923) pursuant to a judgment of the Full Court of the High Court (December 16, 1921) upon a case stated

* *Present:* LORD SHAW, LORD SUMNER, LORD PHILLIMORE, LORD DARLING, and LORD SALVESEN.

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by Starke J. under s. 46, sub-s. 3, of the Land Tax Assessment Act, 1910–1916, of the Commonwealth.

The appellants were trustees under the will of Charles Campbell, deceased, a station owner resident in Melbourne. The questions arising upon the appeal were: (1.) whether upon an assessment for land tax for the financial year 1919–1920 under the above-mentioned Act the appellants were entitled under s. 38, sub-s. 7, to deduct 5000*l.* in respect of the share of each surviving daughter of the testator in the income derived from working the testator's station, or (as was held in Australia) to deduct only one sum of 5000*l.*; and (2.) whether the respondent was estopped from denying that the said beneficiaries were taxable as joint owners within that sub-section, having regard to the judgment of the High Court as to the assessment for the financial year 1918–1919.

The facts, and the material provisions of the Act, appear from the judgment of the Judicial Committee. The said judgment proceeded entirely upon the question of estoppel above mentioned.

The Full Court (Knox C.J., Starke and Higgins JJ.) held that the beneficiaries were not taxable under the Act as joint owners, and that only one deduction of 5000*l.* could be made; further (Higgins J. dissenting) that the Commissioner of Taxation was not estopped by the judgment with regard to the assessment for 1918–1919. The decision of the Full Court upon the case stated is reported at 29 C. L. R. 537. The decision upon the case stated upon the objection to the 1918–1919 assessment is reported at 27 C. L. R. 440.

1925. Oct. 22, 23, 26, 27. *Clauson K.C.*, *W. A. Greene K.C.* and *du Parcq* for the appellants contended that under the Act the beneficiaries were taxable as joint owners; further, that the respondent was estopped by the decision as to the 1918–1919 assessment. In support of the latter contention reference was made to cases mentioned in the judgment of the Bench, also to: *In re South American and Mexican Co.* (1); *Cooke* v. *Rickman* (2); *Jones* v.

(1) [1895] 1 Ch. 37. (2) [1911] 2 K. B. 1125.

Lewis (1); *Reg.* v. *Inhabitants of Hartington* (2); *Reg.* v. *Hutchings.* (3)

Sir John Simon K.C. and *Hon. Geoffrey Lawrence K.C.*, for the respondent, contended that no estoppel arose, as the question whether the children of the testator were joint owners under the Act was not litigated in the previous proceedings; they referred to: *Duchess of Kingston's* case (4); *Blackham's* case (5); *Outram* v. *Morewood* (6); *Carter* v. *James* (7); *Boileau* v. *Rutlin* (8); *Goucher* v. *Clayton* (9); *Irish Land Commissioners* v. *Ryan* (10); *Kennedy* v. *Kennedy* (11); *Cromwell* v. *County of Sac* (12); and *New Orleans* v. *Citizens' Bank.* (13)

Clauson K.C. replied.

Dec. 17. The judgment of their Lordships was delivered by

LORD SHAW. This is an appeal by special leave from two judgments of the Full Court of the High Court of Australia given on December 16, 1921, and November 2, 1923. The first judgment was given upon a special case which had been stated for the opinion of the Full Court by Starke J. upon the hearing of an appeal by the appellants against their assessment by the Commissioner of Taxation for the purpose of land tax for the financial year 1920–1921. That learned judge, giving effect to the answers made by the Full Court to the questions in the special case, dismissed the appellants' appeal and, on November 2, 1923, the Full Court affirmed his judgment. The substance of the appeal has reference to the correctness of the answers given to the questions in the special case. These questions and answers will be afterwards stated.

Mr. Charles Campbell, a merchant and station owner, resident in Melbourne, died on September 13, 1905, possessed

(1) [1919] 1 K. B. 328, 344.
(2) (1855) 4 E. & B. 780.
(3) (1881) 6 Q. B. D. 300, 303.
(4) (1776) 2 Sm. L. C. 754.
(5) (1708) 1 Salk. 290.
(6) (1803) 3 East, 346.
(7) 13 M. & W. 137.
(8) (1848) 2 Ex. 665.
(9) (1865) 34 L. J. (Ch.) 239.
(10) [1900] 2 I. R. 563.
(11) [1914] A. C. 215, 220.
(12) (1876) 94 U. S. 351.
(13) (1897) 167 U. S. 371, 396, 397.

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of considerable real and personal estate in Australia. Seven children survived him. By his will he devised and bequeathed his station properties and the stock, etc., thereon upon trust to carry on and work the properties until twenty-one years from his death. The income was to be enjoyed by his children, and should any child predecease him, leaving issue, the issue was to enjoy the parent's share of income. There are various provisions as to the particular dates and periods from and during which annual income should be reckoned. In the view taken in this case these points are immaterial. Upon the expiration of the twenty-one years the trustees were directed to sell the properties and stock, etc., and to divide the proceeds equally among such children as should be living at the expiration of the twenty-one years, grandchildren again taking their parent's share.

As mentioned, the seven children named in the will were alive at the testator's death; but one married daughter died in January, 1912, leaving two children. A question was raised in the proceedings after mentioned as to the rights of these grandchildren, and it was held that they were not entitled to what is termed in the statute an "original share in the land," they not having a "first life or greater interest . . . . in the land or income therefrom." This question is frequently referred to in the course of the case: but the judgment upon it was accepted at their Lordships' Bar; and that matter is accordingly no longer in issue. The appeal may be, therefore, treated as an appeal by the six children of the testator named in his will and still surviving. The question in the case has reference to the taxation to be imposed upon the estate, or upon various portions of or interests therein, under Mr. Campbell's will.

This depends upon the construction to be given to certain sections and sub-sections of the Land Tax Assessment Act, 1910–1916.

The relevant provisions of the Act are as follows:—

"10.—(1.) Subject to the provisions of this Act, land tax shall be levied and paid upon the unimproved value of all lands within the Commonwealth which are owned by

taxpayers, and which are not exempt from taxation under this Act.

" 11.—(1.) Land tax shall be payable by the owner of land upon the taxable value of all the land owned by him. . . . .

" (2.) The taxable value of all the land owned by a person is . . . . (*b*) in the case of an owner . . . . the balance of the total sum of the unimproved value of each parcel of the land, after deducting the sum of 5000*l*."

So far for the simplest case—namely, that of owners.

The case of joint owners is specifically dealt with in s. 38. The sub-sections thereof which are material to the question in the appeal are :—

" (1.) Joint owners of land shall be assessed and liable for land tax in accordance with the provisions of this section.

" (2.) Joint owners (except those of them whose interests are exempt from taxation under s. 13 or s. 41 of this Act) shall be jointly assessed and liable in respect of the land (exclusive of the interest of any joint owner so exempt) as if it were owned by a single person, without regard to their respective interests therein or to any deductions to which any of them may be entitled under this Act, and without taking into account any land owned by any one of them in severalty or as joint owner with any other person.

" (3.) Each joint owner of land shall in addition be separately assessed and liable in respect of : (*a*) his individual interest in the land (as if he were the owner of a part of the land in proportion to his interest), together with (*b*) any other land owned by him in severalty, and (*c*) his individual interests in any other land."

Sub-ss. 7 and 8, in the construction of which arises the true subject of controversy in the appeal, are as follows :—

" (7.) Where, under a settlement made before July 1, 1910, or under the will of a testator who died before that day, the beneficial interest in any land or in the income therefrom is for the time being shared among a number of persons, all of whom are relatives of the settlor or testator by blood, marriage, or adoption, in such a way that they are taxable as joint owners under this Act, then, for the purpose of their joint

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assessment as such joint owners, there may be deducted from the unimproved value of the land, instead of the sum of 5000*l.* as provided by para. (*b*) of sub-s. 2 of s. 11 of this Act, the aggregate of the following sums namely: In respect of each of the joint owners who hold an original share in the land under the settlement or will (*a*) the sum of 5000*l.* . . . .

"Provided that, where the same persons have a beneficial interest in land or in the income therefrom under more than one settlement or will or under a settlement and will, they shall be jointly assessed in respect of the whole of their interests under the settlements or wills or settlement and will, and there may be deducted in the joint assessment from the unimproved value of the land comprised in the joint assessment, instead of the sum of 5000*l.* as provided by para. (*b*) of sub-s. 2 of s. 11 of this Act, the aggregate of the following sums—namely: In respect of each of the joint owners who holds an original share in the land being jointly assessed (*a*) the total sum of 5000*l.*, ...

"(8.) In this section, 'original share in the land' means the share of one of the persons specified in the settlement or will as entitled to the first life or greater interest thereunder in the land or the income therefrom, or to the first such interest in remainder after a life interest of the settlor or after a life interest of the wife or husband of the settlor or testator."

In the full argument on the appeal much stress was laid upon the definition section of the statute and specially upon the following definitions:—

"'Owner,' in relation to land, includes every person who jointly or severally, whether at law or in equity (*a*) is entitled to the land for any estate of freehold in possession; or (*b*) is entitled to receive, or in receipt of, or if the land were let to a tenant would be entitled to receive, the rents and profits thereof, whether as beneficial owner, trustee, mortgagee in possession, or otherwise; and includes every person who by virtue of this Act is deemed to be the owner.

"'Joint owners' means persons who own land jointly or in common, whether as partners or otherwise, and includes

persons who have a life or greater interest in shares of the income from the land."

While the present appeal concerns the assessment for the year 1920–1921, its determination may depend upon, or at least it is material to see what had been done by and decided between the parties concerning the assessment of two years before—namely, for the year 1918–1919.

By their return under s. 15, sub-s. 1, of the Act in respect of land tax for the financial year 1918–1919 the appellants claimed seven deductions of 5000*l*. The respondent on that occasion, in assessing, disallowed the deductions claimed in respect of the shares of the beneficiaries. The appellants thereupon lodged objections and claimed to be entitled to seven deductions as being trustees for persons taxable as joint owners and holders of the original shares within s. 38 of the Act. In accordance with the statute the objections were treated as an appeal, and were so transmitted to the High Court.

In the opinion of the Board it is highly important to keep fully in view what were the exact terms of that objection. (It is again explained that no question arose before the Board as to seven deductions, as it was not argued that grandchildren but only that each of the six children were entitled to a deduction of 5000*l*. For the sake of convenience accordingly the word " seven " is named as " six " throughout.)

The objection was in the following terms : " I hereby give you notice that I object to the assessment of land tax under the above register number, and contained in the notice of assessment issued by you under date April 12, 1919, for the following reasons : 1. That the beneficiaries named in the will of the testator Charles Campbell who died before the first day of July, 1910, all of whom are relatives of the testator by blood, marriage or adoption are entitled to the beneficial interest in the lands known as ' the station properties ' or in the income therefrom in such a way that they are taxable as joint owners under the Land Tax Assessment Acts 1910–1916 and that they are the holders of original shares in such lands being entitled to the first life or greater interest in such lands

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or the income thereof. 2. That the taxpayer is entitled to six deductions of 5000*l.* each pursuant to the provisions of ss. 38 and 38A of the Land Tax Assessment Acts 1910–1916 and any amendments thereof.

"Date May 3, 1919."

The Commissioner of Taxation disallowed the objection.

In the transmission to the High Court, according to the procedure under the statute, the Commissioner of Taxation thus narrated what had been done: "And whereas pursuant to reg. 40 (1.) of the regulations made under the said Act the taxpayers being dissatisfied with such assessment did within 30 days from date of the service of the said notice of assessment namely on May 3, 1919, lodge an objection in writing dated the same day with the Commissioner against such assessment. And whereas the Commissioner considered such objection and pursuant to reg. 40 (2.) of the said regulations gave written notice to the taxpayer on July 29, 1919, wholly disallowing the said objection, And whereas the taxpayers being dissatisfied with the decision of the Commissioner on August 4, 1919, required the objection to be treated as an appeal and transmitted to the High Court of Australia in its original jurisdiction at Melbourne pursuant to reg. 40 (2.) of the said regulations, Now therefore the Commissioner of Taxation as required by the taxpayers as aforesaid hereby transmits the said objection to the High Court of Australia at Melbourne."

At the hearing Gavan Duffy J. stated a case for the opinion of the Full Court upon the questions: (1.) Whether the shares of the joint owners or of any and which of them in the land were original shares within s. 38: and (2.) How many deductions of 5000*l.* the respondent should make.

The Full Court (Knox C.J. and Starke J.; Isaacs J. dissenting) having heard the appeal pronounced judgment thereupon, holding that the questions should be answered as follows: (1.) The shares of the six children surviving at the date of the assessment. (2.) Six.

This opinion on the special case being given, the further hearing of the appeal was resumed before Gavan Duffy J. and, upon May 24, 1920, he pronounced a final order. It

narrated the notice of objection of the appellants and the memorandum of the respondent transmitting the objection for determination of formal appeal, together with the subsequent presentation of the case for the opinion of the Full Court, and it concluded: "This Court doth order that this appeal be and the same is hereby allowed and that the number of deductions of 5000*l.* to be made by the respondent in the said assessment be six."

The learned judge (in the subsequent special case about to be referred to) narrated what had happened at this last stage of that litigation, in this language: "(3.) That the hearing of the appeal was purely formal. No arguments were adduced by either party. The parties treated the answers of the High Court to the questions stated as covering the whole ground of the appeal. The attention of the justice who heard the appeal was not directed to the question whether the beneficiaries under the will of Charles Campbell were taxable as joint owners and he did not in fact decide that question."

Matters were allowed to rest upon this footing for another year. And then, in the subsequent year, the whole matter was reopened by the action of the Commissioner of Taxation who, in respect of the same estate and the same parties, reverted to the position that the taxable value should not be six sums of 5000*l.* as decided in the former case, but one sum of 5000*l.* To this it was answered, to put the matter briefly, that the former decision was right upon its merits, but that whether so or not, the respondent was estopped by the judgment already pronounced. If this argument be sound there is an end of the case; and it will be unnecessary to enter upon the merits of the difference between the parties upon the construction of the statute.

In the opinion of their Lordships the contention of the appellants is sound, and the respondent is estopped by judgment.

It is, however, necessary to examine carefully the argument presented against such estoppel. It amounts to this—that in the former case it was not matter of decision that the appellants were joint owners, but was matter of admission.

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In the judgment of Isaacs J., who dissented from his two learned brethren, he pointed this out in such a way as to suggest that, although the Court had been bound to accept the admission, still it was erroneous in law. Accepting this hint, the respondent proceeded as for the year 1920–1921 to challenge the fact of joint-ownership which it was alleged had been matter of admission, and to assess upon the footing that the number of deductions from the capital should be one, and should not be six, as had been decided.

To this a notice of objection was lodged on May 16, 1921, the first head being that "the said assessment is erroneous in matter of law" and the second being as follows: "That the beneficiaries in the station properties trust come within the definition of joint owners and that the six deductions of 5000*l.* each under s. 38, sub-s. 7, of the Act as claimed in the trustee's return and as allowed by the High Court of Australia in respect of the trustee's return for 1918–1919 have wrongly been disallowed in the said assessment—and that such assessment should accordingly have been made on a taxable balance of 183,254*l.*"

The objection, being transmitted as an appeal, came before Starke J., and a special case was stated by him for the opinion of the Full Court, which contained the following questions—namely: "2. How many deductions of five thousand pounds are the trustees entitled to on the footing that the Commissioner is not estopped by any judgment? 3. Is the Commissioner estopped by judgment from contending that the trustees are not entitled to six deductions of five thousand pounds?"

The Full Court (Knox C.J., Starke and Higgins JJ.) answered as follows: 2. One—pursuant to s. 11 of the Act. 3. No. Higgins J. dissented as to answer 3, and stated that in his opinion the respondent was estopped by the previous judgment.

The appellants contend that the dissent of the learned judge was right and that the question how many deductions of 5000*l.* the trustees are entitled to has already been settled for the years 1918–1919 and settled expressly by the High

Court of Australia. This was the subject of a full argument in which the respondent contended that the previous litigation proceeded upon the footing of an admission that Mr. Campbell's children were joint owners and that such an admission was erroneous in law. Arguing on the merits, he maintained that, a proper construction being put upon the terms of Mr. Campbell's will, such error is made out, and that accordingly no decision of the Courts was obtained on what it is argued was the true point for determination in the later appeal.

As to the amount of deduction to be made under the Act, being either six sums of 5000*l.* or one sum of 5000*l.*, the former litigation settled six; the judgment under appeal settled one. There is accordingly between the same parties in regard to the same property a definite prescription of deduction from assessable values. The Board is of opinion that that prescription was as conclusively settled in the former litigation as language could settle it, it having been "How many deductions of 5000*l.* the respondent should make?" and the judicial answer being "six." Apart from the other arguments and the authorities to be presently alluded to, the case appears thus to be concluded in favour of the appellants.

Very numerous authorities were referred to. In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law

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that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle—namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs.

Out of respect to the learned judges in the Courts below and to the sustained argument at the bar, one or two of the cases of outstanding authority are referred to.

In *Outram* v. *Morewood* (1), an action of trespass over a certain vein of coals lying under the close of the plaintiff, it was held that if a verdict be found on any fact or title, distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties or their privies, in respect of the same fact or title.

In a previous action an issue was found for the plaintiff and against the wife, one of the two subsequent defendants, her husband being the other defendant with her in the action under decision. Lord Ellenborough C.J. said (2): "The operation and effect of this finding, if it operate at all as a conclusive bar, must be by way of estoppel. If the wife were bound by this finding, as an estoppel and precluded from averring the contrary of what was then so found, the husband, in respect of his privity, either in estate, or in law, would be equally bound." And in subsequent portions of his judgment (3) he spoke as follows: "A finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession. . . . . And it is not the recovery, but the matter alleged by the party, and upon which the recovery

(1) 3 East, 346. (2) Ibid. 353. (3) Ibid. 354, 355.

proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury: but the estoppel precludes parties and privies from contending to the contrary of that point, or matter of fact, which having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them."

The rule extends, not merely to Courts having the same jurisdiction but to the judgments of all Courts of competent jurisdiction. A striking instance of this was the case of *Barrs* v. *Jackson* (1), in which a judgment was pronounced by Knight-Bruce V.-C. in the course of which much citation was made as to Courts of ecclesiastical jurisdiction. The decision of the Vice-Chancellor is compendiously stated in the headnote. It was to the following effect: "In a suit instituted in the Chancery Division for the distribution of the assets of an intestate, the grant of letters of administration is not conclusive evidence upon the question who is the intestate's sole next of kin."

This judgment was reversed, and a judgment in a directly contrary sense was pronounced by Lord Lyndhurst. (2)

A further instance, this time of the application of the doctrine to estoppel in the Court of King's Bench by reason of a judgment of a county court, is the case *In re Graydon* (3), in which a county court judge had held that a sum of 20*l.* was in the nature of personal earnings on the part of a bankrupt patentee and belonged to the bankrupt. Subsequent royalties having become due the trustee applied to the Bankruptcy Court for a declaration that they vested in him after-acquired property. It was held that the judgment of the county court estopped the trustee from asserting that the royalties were not the bankrupt's personal earnings. The question as to the quantum of the allowance to be made to the bankrupt was another matter, and that allowance was varied; but Vaughan Williams J. said that he thought the fair inference

(1) (1842) 1 Y. & C. 585. (2) (1845) 1 Phil. 582.
(3) [1896] 1 Q. B. 417.

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from the judgment of the county court judge was that the trustee did decide that the sums in question were in the nature of personal earnings. The trustee was accordingly estopped from denying this to be the nature of the payments when made. It plainly appears that the learned judge was himself of opinion that the royalties were not the personal earnings of the bankrupt; but this very properly made no difference upon the point of estoppel. The trustee was estopped from making that assertion by the judgment of the county court.

But the respondent maintained with much elaboration that an analysis of the first judgment pronounced by the Full Court showed that the grounds of that judgment, which it was maintained were erroneous in law, proceeded upon an admission that Mr. Campbell's children were joint owners; and he founded strongly upon such statements from the Bench as that of Starke J., already quoted, that attention had not been directed to the question of joint ownership in the debates in the former case.

It might be sufficient to say, in answer to the entire argument on this head, that whether the point as to joint ownership depended upon admission of fact upon evidence led or upon argument upon construction of a statute, that is, as already stated, nothing to the point in considering the question of estoppel. There would be no quieting of litigation unless the judgment was taken as it stands. It is plain that the res in the present case was adjudged, that res being, in figures, that six times 5000*l.* should be the suitable deduction from the assessed property.

In the citation of authority upon this topic confusion is apt to be introduced by lack of the following consideration of a point peculiar in former days to English procedure.

Two authorities were relied upon by counsel for the respondent. Taking them in order of date they are *Carter* v. *James* (1), decided in 1844, and *Howlett* v. *Tarte* (2), decided in 1861. As is shown by passages in the judgment of Alderson B. in the one and Byles J. in the other, they depended upon the old rules of pleading. The rule that pleadings

(1) 13 M. & W. 137. (2) 10 C. B. (N. S.) 813.

must not be double, as expressed by Stephen on Pleading (ch. 3, s. 3), and Bullen & Leake (3rd ed., p. 441), prevented a defendant from pleading more than one plea to the declaration, or if there were several counts in the declaration more than one plea to each count, and prevented a plaintiff from pleading more than one replication to each plea.

The strictness of the common law rule was relaxed by the statute 4 & 5 Anne, c. 16, s. 4, enabling a defendant with leave of a judge to plead several pleas, and by the Common Law Procedure Act, 1852, and the rules of Hilary Term, 1853, extending this principle to replications, and allowing certain specified pleas to be pleaded as of right without leave.

But till the Judicature Acts, 1873 and 1875, it remained the law that, except in those cases specially mentioned, several pleas and several replications could only be pleaded by the leave of the Court or a judge, and this leave was by no means obtainable as a matter of course, and was indeed not seldom refused.

It was customary in order to save a possible estoppel for a defendant who had two answers each of which seemed to be good, but who was limited by the rules to one, to insert in his plea or accompany his plea with a protestation, and the pleading was known as a protestando. In this way the defendant, while protesting that he had other answers to the declaration, nevertheless being confined to one answer, put forward one only. Alderson B. refers in his judgment already cited to "the ancient practice" of pleading the facts with a protestation. Protestandos, however, were abolished by the Rules of Court of 1834, and their value was always doubtful.

While the rules against double pleading were in force, it would have led to much injustice if a suitor who had two answers to a claim, or two replies to a defence, but was prevented from raising more than one, was deemed to have admitted that he had no other answer or reply than that to which he had to confine himself, and this is the ratio decidendi of the two cases on which reliance was placed for the respondent. Thus explained they in no way derogate from the general principles of law.

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It is seen from this citation of authority that if in any Court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision. The rule on this subject was set forth in the leading case of *Henderson* v. *Henderson* (1) by Wigram V.-C. as follows: "I believe I state the rule of the Court correctly when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." This authority has been frequently referred to and followed, and is settled law.

"I think," said Williams J. in *Howlett* v. *Tarte* (2), "it is quite clear upon the authorities to which our attention has been called, and upon principle, that, if the defendant attempted to put upon the record a plea which was inconsistent with any traversable allegation in the former declaration, there would be an estoppel."

This passage has been accepted expressly over and over again, as for instance by Phillimore J. (now Lord Phillimore) in *Humphries* v. *Humphries* (3) and Farwell L.J., in the same case on appeal. (4) An instance of the application of the principle to the construction of clauses in the

(1) (1843) 3 Hare, 114.
(2) 10 C. B. (N. S.) 813, 826.
(3) [1910] 1 K. B. 796, 801.
(4) [1910] 2 K. B. 531, 535.

testator's will is to be found in the judgment of this Board pronounced by Lord Macnaghten in *Badar Bee* v. *Habib Merican Noordin*. (1) It must, however, be pointed out that *Carter* v. *James* (2) and *Howlett* v. *Tarte* (3) turned upon default in pleading in the prior proceedings, relied upon as an estoppel; but in a case like the present, where there are no pleadings at all, the main question is whether a prior opportunity of raising the point now foreclosed by estoppel had in substance arisen and been passed by. In short, the present point was one which, if taken, went to the root of the matter on the prior occasion, so that its omission was no mere default in pleading but a real attempt to divide one argument into two and to multiply litigation.

Reference may be finally made in a word to the argument submitted to the Board to the effect that the admission and assumption of joint ownership made in the former case between these parties were upon a matter which was only incidentally or collaterally related to the point actually discussed and litigated.

Much stress was laid on the fact that, in the present case, an express decision upon the point of joint ownership was come to, and that this was not so in the former case. To which the answer is contained in a reference to the language of s. 38, sub-s. 7, of the statute as follows—namely, that where, under a settlement, income is shared by relatives of the settlor "*in such a way that they are taxable as joint owners* under this Act," then, for the purpose of their joint assessment "*as such joint owners* there may be deducted . . . . in respect of each of the joint owners who hold an original share in the land" 5000*l*. The former judgment was pronounced by the Australian Courts under that section. It was not merely incidental or collateral to the question so decided that the appellants were joint owners. It was fundamental to it. Unless it had been decided that, under the settlement, Mr. Campbell's children had a beneficiary interest in land or income "in such a way that they are taxable as joint owners"

(1) [1909] A. C. 615. (2) 13 M. & W. 137.
(3) 10 C. B. (N. S.) 813.

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they could not have been taxed at all. On this portion of the case their Lordships' opinion is entirely in accord with the judgment of Higgins J. in the Full Court.

Their Lordships will humbly advise His Majesty that the appeal be allowed with costs to the appellants both here and below, and that it be remitted to the High Court of Australia to direct that question 3 of the special case—namely, "Is the Commissioner estopped by judgment from contending that the trustees are not entitled to six deductions of 5000*l.*," be answered in the affirmative, and that the other questions are thus superseded.

Solicitors for appellants: *Radcliffes & Hood, St. Barbe Sladen & Wing.*

Solicitors for respondent: *Coward, Chance & Co.*

[HOUSE OF LORDS.]

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ADELAIDE STEAMSHIP COMPANY, LIMITED . . . . . } APPELLANTS;

AND

ATTORNEY-GENERAL . . . . . RESPONDENT.

Shipping—Charterparty—Requisition—Charterparty T. 99—Ambulance Transport—Consequences of warlike Operations—Collision caused by Negligence of requisitioned Ship—Liability of Crown—Measure of Damages—Indemnity against Damages payable to third Parties—Compensation for Loss of Hire.

The steamship *Warilda* was taken over during the war by the Admiralty on the terms of Charterparty T. 99 for use as an ambulance transport. Whilst carrying wounded soldiers from Havre to Southampton the *Warilda* came into collision with another ship, and both ships were damaged. In an action arising out of the collision it was held that the collision was caused by the negligence of the master of the *Warilda*, and that the *Warilda* was liable to the other ship for damages. Charterparty T. 99 provided (cl. 19) that the Admiralty would take over war risks excluded from an ordinary marine policy by the f. c. and s. clause,

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* *Present:* VISCOUNT CAVE L.C., LORD ATKINSON, LORD BUCKMASTER, LORD CARSON, and LORD BLANESBURGH.

which included all consequences of hostilities or warlike operations, and (cl. 25) that if from deficiency of men or stores, breakdown of machinery, "or any other cause," the work of the steamer was at any time suspended, pay should cease for the whole of the period during which the vessel was inefficient. It was agreed that an ordinary marine policy incorporated the Institute Time Clauses, including the running down clause, which provided that, if the insured ship became liable to pay and paid damages to another ship in respect of a collision, the insurers would pay to the assured three-fourths of the sum so paid, and would also, if the liability of the insured ship had been contested with the consent of the insurers, pay a like proportion of the costs thereby incurred. Upon a petition of right by the owners of the *Warilda*, it was held by the House of Lords ([1923] A. C. 292) that the collision was a consequence of a warlike operation, and that the owners were entitled to recover from the Crown such sum as should be found due to them by the judge of the Commercial Court. Upon the assessment of damages the owners of the *Warilda* claimed (inter alia) (1.) three-fourths of the sum which they had been held liable to pay in the collision action; (2.) three-fourths of the costs of defending that action; (3.) compensation for loss of hire during the period when the *Warilda* was undergoing repair:—

Held, (1.) (by Viscount Cave L.C., Lord Atkinson, and Lord Buckmaster; Lord Carson and Lord Blanesburgh dissenting) that the liability undertaken by the running down clause was not a risk which would be excluded by the f. c. and s. clause, and that the Crown was not liable to indemnify the *Warilda* wholly or in part against the liability which she had incurred to third parties in consequence of the negligence of her master; (2.) that the claim for costs failed, as the Crown had not consented to the liability of the *Warilda* being contested; (3.) (Lord Blanesburgh doubting but acquiescing) that the claim for loss of hire was excluded by cl. 25 of the charterparty and was not recoverable under cl. 19.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal affirming an order of Greer J.

The facts sufficiently appear from the opinion of the Lord Chancellor, and are summarized in the headnote.

Upon a petition of right in which the appellants were suppliants, the House of Lords (1) (affirming a decision of the Court of Appeal (2)) held that a collision which occurred between the appellants' steamship *Warilda* and the steamship *Petingaudet* was a consequence of warlike operations, and that the appellants were entitled to recover from the Crown such sum as should be found due to them by the judge of the Commercial Court.

(1) [1923] A. C. 292. (2) [1923] 1 K. B. 59.

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On the assessment of damages the questions at issue were whether the appellants were entitled to recover from the Crown as part of their damages (1.) Three-fourths of the sum which the appellants became liable to pay and had paid by way of damages to the owners of the *Petingaudet* for the damage caused to the *Petingaudet* by the collision; (2.) Three-fourths of the costs incurred by the appellants in contesting the liability of the *Warilda* for the collision; (3.) Hire money or compensation during the period when the *Warilda* was undergoing repair of the damage which she sustained in the collision.

Greer J. disallowed all these claims, and his decision was affirmed by the Court of Appeal (Bankes, Warrington and Scrutton L.JJ.).

1925. Oct. 26, 27, 29. *Dunlop K.C.* (with him *Hugh Dumas*) for the appellants. All the sums in question are claimed as sums for which the Admiralty were responsible as war risk underwriters. Under the f. c. and s. clause the Admiralty accepted liability for all consequences of warlike operations, and this House has held that the collision between the *Warilda* and the *Petingaudet* was a direct consequence of a warlike operation, although that operation was negligently conducted by the master of the *Warilda*. The dominant or effective cause of the damage to both ships and of the liability of the appellants to pay for the damage to the *Petingaudet* was the warlike operation and not the negligent conduct of it. The liability of the Crown to indemnify the appellants is not limited to the injury received by the *Warilda* itself. No distinction should be drawn between the damage done to the one ship or to the other, or between those two damages and the liability to pay damages to the other ship. When once the conclusion is arrived at that the warlike operation was the cause of the collision negligence is out of the question, and that has been so held by this House.

[He referred to *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1); *Cory* v. *Burr* (2); *Britain Steamship*

(1) [1918] A. C. 350.

(2) (1883) 8 App. Cas. 393, 397.

Co. v. *The King* (1); *Harris* v. *Scaramanga* (2); *Hindustan Steamship Co.* v. *Admiralty Commissioners.* (3)]

Clause 1 of the Institute Time Clauses, the running down clause, must be read in connection with cl. 21, the f. c. and s. clause. The latter clause is an exception to the liability of the underwriters to every part of the contract of marine insurance. Therefore if the collision is a consequence of a warlike operation the obligation of the underwriters to indemnify the owners of the *Warilda* against their liability to pay damages to the owners of the *Petingaudet* comes out of cl. 1 and automatically comes within cl. 21. The question whether the negligence of the master was such as to constitute a novus actus interveniens is covered by the decision of this House. Greer J. and the Court of Appeal, in dealing with the first claim, have gone wrong in distinguishing between the cause of the collision and the liability of the owners to pay damages. They also relied on the concluding sentence of cl. 19 of the charterparty: "Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss," as excluding the risk covered by the collision clause; but that sentence is a mere valuation clause; it was not intended to limit the risks, but to define the insurable value of the ship in the case of a total loss, and it substituted the value at the time of the loss for the value at the commencement of the risk. [He referred to the Marine Insurance Act, 1906, ss. 16, 67, 69.] Many losses would fall on the Admiralty under cl. 19 to which the third sentence would be inapplicable: *Pyman Steamship Co.* v. *Admiralty Commissioners.* (4) As to the claim for loss of hire, cl. 19 covers the whole of the interests comprised in the contract of affreightment. Part of the damage incurred is loss of hire. The Institute Time Clauses deal in terms with loss of hire, and they are admitted to be part of the policy referred to in cl. 19.

Sir Thomas Inskip S.-G. and *Raeburn K.C.* (with them *Balloch*) for the respondent. In the petition of right the

(1) [1921] 1 A. C. 99, 124–5.
(2) (1872) L. R. 7 C. P. 481, 489, 498.
(3) (1921) 37 Times L. R. 856.
(4) [1919] 1 K. B. 49.

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question of negligence was merely a factor in determining whether the collision was a consequence of a warlike operation, and it was held that negligence did not break the chain of causation. But the liability of the *Warilda* was entirely outside any issue in the petition of right. It is said that because this House has held that the collision was a consequence of a warlike operation, therefore the liability of the *Warilda* to the *Petingaudet*, which was the direct result of negligence, was covered by that decision. That does not follow. The Admiralty have not made themselves liable for the consequences of negligence. A contract to indemnify against sea perils does not, apart from the running down clause, include the liability to pay third parties: *De Vaux* v. *Salvador* (1); *Xenos* v. *Fox*. (2) The f. c. and s. clause transfers a particular group of perils from the marine underwriters to the war risk underwriters, but the perils transferred are the ordinary perils only. The damage resulting from the excepted perils does not include this damage, because it is too remote. The running down clause is an addition to the perils insured against, and all that the Admiralty has taken over is a special group of the perils insured against. The f. c. and s. clause takes out of the policy perils; it is not on the same plane as the running down clause, which covers a totally different matter. "Consequences of hostilities" means proximate consequences, and under those words the owner would not recover anything beyond injury to his own ship: *Ionides* v. *Universal Marine Insurance Co.* (3) That disposes of the first claim. On any view the claim for costs fails, as the Crown did not consent to the liability of the *Warilda* being contested. The claim for loss of hire also fails. Underwriters are liable for repairs, but they are not liable for loss of hire while the ship is under repair.

Dunlop K.C. replied.

[*Taylor* v. *Dewar* (4) was also referred to.]

The House took time for consideration.

(1) (1836) 4 Ad. & E. 420, 431.
(2) (1868) L. R. 3 C. P. 630, 635.
(3) (1863) 14 C. B. (N. S.) 259, 285, 289, 290.
(4) (1864) 5 B. & S. 58.

1925. Dec. 11. VISCOUNT CAVE L.C. My Lords, this appeal is concerned with the third stage in a prolonged litigation which has arisen out of a collision between the steamship *Warilda* (acting as an ambulance transport) and the steamship *Petingaudet* (a merchant vessel), which occurred in the early morning of March 24, 1918. In the first stage of the contest, a collision action which was carried to this House, it was determined that the collision was due to the negligence of the master of the *Warilda*, and the *Warilda* was held liable to the *Petingaudet* for damages. In the second stage, which also reached this House, it was determined that the collision was a consequence of a warlike operation in which the *Warilda* was engaged, and accordingly that under cl. 19 of the charterparty under which the vessel was being employed (which was the familiar charterparty T. 99) the *Warilda* was entitled to recover from His Majesty damages for the collision. The third stage, in which this appeal arises, is concerned with the measure of these damages, and the questions litigated are whether the *Warilda* can recover from the Crown as part of such damages: (1.) three-fourths of the sum which the *Warilda* has been held liable to pay to the *Petingaudet* for the damage caused to that vessel, (2.) three-fourths of the costs incurred by the *Warilda* in defending the collision action, and (3.) hire money or compensation for loss of hire during the period when the *Warilda* was herself undergoing repair. Greer J. and the Court of Appeal have held that none of these sums can be recovered, and the appeal is against that decision.

Upon the first point the arguments were well balanced, but upon the whole I have come to the conclusion that the decision of the Court of Appeal is right. Clause 19 of charterparty T. 99 (which has the marginal note "War risks damage or loss of ship") is in the following terms: "19. The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause: 'Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt

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thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war.' "

It is common ground that an ordinary English policy of marine insurance would contain the Institute Time Clauses, including the first of those clauses, which is known as the collision or running down clause, and which provides (in effect) that, if the insured ship comes into collision with another ship and becomes liable to pay and pays damages in respect of such collision, the insurer will pay to the assured three-fourths of the sum so paid, and will also if the liability of the insured ship has been contested with the consent in writing of the insurer, pay a like proportion of the costs which the assured thereby incurs or is compelled to pay. This being so, the question to be determined in this case is whether the liability undertaken by the collision clause is or is not a risk which would be excluded by the " f. c. and s." clause set out in cl. 19 of the charterparty as being a consequence of warlike operations. If it would, then the Crown is clearly liable ; but if not, the claim now under consideration must fail. My Lords, I do not think that it would be so excluded. It was held in *Ionides* v. *Universal Marine Insurance Co.* (1), and has not since been doubted, that in applying the exception created by the f. c. and s. clause the Court must look at the proximate and not at the remoter consequences of the warlike operation ; and while it has been decided by this House that the collision itself and the consequent damage to the *Warilda* were the direct result of the warlike operation in which the *Warilda* was engaged, it does not follow that the liability of the *Warilda* to the owner of the *Petingaudet* falls within the same category. That liability arose, not from the collision taken by itself, but from the negligence of the master of the *Warilda*, which alone constituted the cause of action, and was, therefore, not a direct and proximate consequence of the warlike operation. This seems to me to follow from the decision in the case of *De Vaux* v. *Salvador* (2), where it was held that the sum

(1) 14 C. B. (N. S.) 259. (2) 4 Ad. & E. 420, 431.

which a shipowner had to pay for damage to another ship caused partly by the negligence of his servants was too remote from the sea perils against which his ship was insured to be recovered by him under a marine policy. Lord Denman, in delivering the judgment of the Court in that case, said: "The ship insured is driven against another by stress of weather; the injury she thus sustains is admitted to be direct, and the insurers are liable for it. But the collision causes the ship insured to do some damage to the other vessel; and, whenever this effect is produced, both vessels being in fault, a positive rule of the Court of Admiralty requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two. It turns out that the ship insured has done more damage than she has received, and is obliged to pay the owners of the other ship to some amount, under the rule of the Court of Admiralty. But this is neither a necessary nor a proximate effect of the perils of the sea; it grows out of an arbitrary provision in the law of nations from views of general expediency, not as dictated by natural justice, nor (possibly) quite consistent with it; and can no more be charged on the underwriters than a penalty incurred by contravention of the revenue laws of any particular state, which was rendered inevitable by perils insured against."

It is true that the policy to be hypothesized under cl. 19 of the charterparty is a policy containing the collision clause, and that where that clause is present in a policy the underwriters are liable for a proportion of the damage caused to the other ship; but this is the result, not of a loss by the perils insured against, but of the "special contract" of the underwriters contained in the collision clause: see *Xenos* v. *Fox*. (1) In these circumstances it seems to me to follow that the Crown is not liable in this case, and is not bound to indemnify the *Warilda* either wholly or partially against the liability which she has incurred to third parties in consequence of the negligence of her master.

My Lords, in arriving at this conclusion I have not relied

(1) L. R. 3 C. P. 630, 635.

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on the third sentence in cl. 19 of the charterparty, which is in the following terms: "Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss, or, if she be injured, on the ascertained value of such injury." I was impressed by the argument of Mr. Dunlop that the purpose of this sentence was, not to limit the liability of the Admiralty to the payment of damage done to the *Warilda*, but only to define the value which was to be put upon the *Warilda*, where the value of that vessel was material; and accordingly I do not found on this stipulation any conclusion adverse to the appellants. But the sentence is at all events not inconsistent with the view which I have taken of the meaning of the clause.

With regard to the claim for three-fourths of the costs incurred by the *Warilda* in resisting liability to the *Petingaudet*, I think that this falls with the claim for three-fourths of the damages; and in any case this claim could hardly have been supported in view of the fact that the Crown did not consent to the proceedings by the *Petingaudet* being contested.

As to the claim for loss of hire while the *Warilda* was under repair, I agree with Greer J. and the Court of Appeal in holding that this is excluded by cl. 25 of the charterparty, which is as follows: "25. If from deficiency of men or stores, breakdown of machinery, or any other cause, the working of the steamer is at any time suspended for a period exceeding twelve running hours, pay shall cease for the whole of such and any subsequent period of whatever duration during which the vessel is inefficient." It was not argued before your Lordships, nor could it (I think) have been successfully argued, that the scope of the words "any other cause" ought to be limited by the ejusdem generis rule; but it was suggested that this claim, if excluded by cl. 25, might be recovered under the contract of insurance contained in cl. 19. To this the answer given by Scrutton L.J., that the Admiralty were not insurers of freight, appears to me to be fatal.

For these reasons I am of opinion that this appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

LORD ATKINSON. My Lords, I have had the pleasure and advantage of reading the judgment which has just been delivered by my noble and learned friend on the Woolsack, and I thoroughly concur in it.

LORD BUCKMASTER. My Lords, two facts lie at the threshold of this appeal, and must be borne in mind in its determination. The first, that the collision between the *Warilda* and the *Petingaudet* has been declared by this House to be a consequence of warlike operations, and the other that it was due to the negligence of the navigating officer of the *Warilda*. It follows from the first that the Admiralty is responsible for the actual damage that the *Warilda* suffered, and from the second that the *Warilda* was responsible to the *Petingaudet* to make good her damage; the main question in this appeal is whether the damage so paid and the costs of the litigation which determined the *Warilda* to blame can be recovered by the *Warilda* from the Admiralty. The rights of the parties are contractual and arise under a document known as T. 99, upon the terms of which the Admiralty requisitioned the *Warilda* by a letter dated August 3, 1915. This document was in the form of a charterparty, but it also contained clauses of marine insurance, the nature and extent of which form the subject of the present controversy. By cl. 18 the Admiralty was exempt from liability for ordinary sea risks, and by cl. 19 they accepted the risks of war in terms which have already been set out. The ordinary English policy of marine insurance contains clauses known as "Institute Time Clauses," the first of which throws upon the insurer the liability to pay, to the extent of three-fourths of the value of the ship, the damages which the insured vessel may be called upon to pay by reason of collision—as well as three-fourths of the costs to which the assured is put in defending proceedings. It is this clause that the appellants say renders the Admiralty liable in the present instance. In my opinion this contention is not well founded. The ordinary marine policy never covered damages paid to third parties owing to negligent navigation: *De Vaux* v. *Salvador* (1), and the

(1) 4 Ad. & E. 420.

H. L. (E.) 1925 ADELAIDE STEAMSHIP CO. v. ATTORNEY-GENERAL. Lord Buckmaster.

clause as to freedom from capture and seizure which operates to limit risks under such a policy does not exclude such liability, for the subject matter on which this exclusion operates never included it: *Xenos* v. *Fox*. (1) The introduction of cl. 1, which was, in fact, an indemnity as to third party liabilities, was not within the ordinary compass of marine insurance, nor do I think its introduction has extended the meaning of the clause as to freedom from capture or seizure so as to make that warranty include something to which in its original meaning it never related. Even if this view be not accepted, I still think the appellants must fail, since the only risks undertaken by the Admiralty are risks of war, and although this accident arose in the course, and therefore as the consequence, of a warlike operation, yet the risk that materialized was the risk due to negligence and not to the risk of war. In the course of a warlike operation an independent negligent act was committed, and it is the liability consequent thereon for which the *Warilda* has been held liable. Upon the question of hire I have nothing to add to what has already been said.

LORD CARSON. My Lords, each of the learned Lords Justices in the Court of Appeal was of opinion that the words in cl. 19 of T. 99, " such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost at the time of such loss or if she be injured on the ascertained value of such injury," excluded the third party risk covered by the collision clause " because," as Bankes L.J. said, " the extent of the Admiralty's liability cannot be measured by the scale indicated in this paragraph "—and indeed the same Lord Justice said that but for the paragraph quoted he should have felt considerable doubt as to the construction to be put upon the clauses constituting the contract. My Lords, it is clear that if the effect of this paragraph was as held by the Lords Justices, there would be no need to go further in the discussion of the case, and that the claim of the appellants would on the main question be without foundation.

(1) L. R. 3 C. P. 630.

I agree with the noble Viscount on the Woolsack that the purpose of the sentence quoted was not to limit the liability of the Admiralty to the payment of damage done to the *Warilda*, but only to define the value which was to be put upon the *Warilda* when the value of that vessel was material. The sections to which we were referred by counsel for the appellants in the Marine Insurance Act of 1906, under the heading of "Measure of indemnity," showed, in my opinion, the necessity for the limitation in the paragraph quoted, whilst it also seemed to me at least that cl. 19 covered risks in which the value of the ship was not involved. I do not think, therefore, that the words in cl. 19, so much relied upon, offer any answer to the case put forward for the appellants.

The main question, however, to be decided is as to whether the owners of the *Warilda* can recover from the Crown the sums they have been compelled to pay to the owners of the *Petingaudet* for damages caused to that ship by the collision, having regard to the decision in this House that the *Warilda* was engaged in warlike operations, though negligently carried out, and that the collision or damage was a consequence of hostilities or warlike operation. I do not desire to repeat again at length clauses 18 and 19 of the charterparty T. 99, but read together they seem to me to define the risks taken by the owners, which may shortly be called, as in the margin, "sea risk," and the risks against which the Admiralty became the insurers—namely, as also described in the margin, "war risk damage or loss of ship." Under this division of "risks" it is clear, to my mind, that all the possible risks were intended to be covered. The risks undertaken by the owners under s. 18 would or might be insured against by them, and it is admitted that any ordinary English policy of marine insurance would contain the clauses known as "Institute Time Clauses," by the first of which the insurer would be obliged to pay to the extent of three-fourths of the value of the ship, the damages which the insured ship might be called upon to pay by reason of the collision.

The question to be determined is, I think, what is the effect of the f. c. and s. clause upon the liability of the insurer under

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this clause ? If there was no f. c. and s. clause it is, I think, clear that the insurer would be liable in the events that have happened. But as the f. c. and s. clause applies and as this House has decided that the collision occurred as a consequence of warlike operations, I think the question narrows down to the liability or non-liability of the insurer under these circumstances.

My Lords, I find it difficult to see how the insurer in such a case could be held liable. If there had been no negligence I apprehend the liability of the Admiralty would be beyond question, but as between owners and the insurer can the negligence make any difference when the f. c. and s. clause applies and you follow to its logical conclusion the decision of this House that the collision or damage " was a consequence of hostilities or warlike operations " ? In my view it is impossible in such a case by drawing a distinction between the " proximate " and the " remoter " consequences of the warlike operation to take away from the insurer the benefit of the f. c. and s. clause and thus render him liable. For the reasons I have briefly stated, I am of opinion that the appellants are entitled to succeed on this branch of their claim.

My Lords, as regards the other branches of claim—namely, the costs incurred by the *Warilda* owners in resisting liability for the consequences of the collision and the claims for loss of time while the *Warilda* was under repair—I am not prepared to dissent from the conclusions come to by the noble Viscount on the Woolsack.

LORD BLANESBURGH. My Lords, three sums are claimed here by the appellants, and, as the considerations applicable to each are not identical, it is convenient to deal with them separately.

The first and, in the importance of the issue it raises, the principal sum represents three-fourths of the amount which the appellants became liable to pay and have paid by way of damages to the owners of the *Petingaudet* for the damage caused to that vessel by the collision between her and the *Warilda*.

The basis of the claim is made apparent by the terms in which it is expressed. It follows the language of the first of the Institute Time Clauses, the collision clause to which the attention of your Lordships has been so frequently directed, and it proceeds upon the footing that the presumed contract between the appellants and the Admiralty—T. 99—is to be read as if there were embodied in it, by reference, a provision in the terms of that clause. And, my Lords, I desire to say at once, that unless that position can be made good by the appellants, they must, in my judgment, fail in this claim. I would, however, also add that if their position in this respect is well founded, then, in the events which have happened, the liability of the Crown in respect of this sum is, I think, at once established.

My Lords, that being the issue, there has never, I think, been any controversy between the parties as to the governing considerations upon which its solution depended. It has throughout been common ground—to adopt the words of Scrutton L.J.—that the effect of clauses 18 and 19 of T. 99 is to put sea risk on the owners and war risk on the Admiralty, a phrase which, further expanded, imports that, subject to any modifying provision in either of these clauses, there is hypothesized an ordinary policy of marine insurance embodying also the Institute Time Clauses with a war risk policy so framed that the two together cover the whole ground. Accordingly, it having been decided by this House that the collision in question resulted from warlike operations of the *Warilda* negligently conducted, in other words, that it resulted from a war risk, it is again common ground—and I think rightly so—that the liability of the Crown in respect of this sum emerges unless one of two things is established: either (*a*) that albeit the collision was a war risk, still the marine underwriter under the hypothesized policy of marine insurance remains, upon the true construction of the collision clause in that policy, liable in respect of this sum; or (*b*) that, as a result, so it is said, of the third sentence of cl. 19 of T. 99 the hypothesized war risk policy is to contain no collision clause at all.

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The Solicitor-General, at your Lordships' Bar, in terms accepted this position. He agreed that unless that third sentence availed the Admiralty to the effect I have stated the Crown must accept liability for this claim, if it was once established, that, under his hypothesized policy the marine underwriter was free of liability in respect of it.

And this has been the position of the Crown's advisers throughout.

"It was contended for the Crown," says Greer J. in his judgment, "that the promise of indemnity contained in the part of the Institute Time Clauses above set out was not affected by the f. c. and s. clause, and that the marine underwriters would continue liable under the Institute Time Clauses, notwithstanding the presence in the policy of the exceptions covered by the f. c. and s. clause; and, secondly, whether that be so or not, the promise of indemnity contained in cl. 19 did not cover the liability of the shipowner to pay damages to the owners of the *Pentingaudet*."

It is, my Lords, of the first importance, as it strikes me, to realize that these are, with reference to this claim, the only issues between the parties. As so stated, the questions in debate at once resolve themselves into mere questions of construction; of the collision clause on the one hand; of the third sentence of cl. 19 of T. 99 on the other. And many considerations—such, for instance, as that of negligence—cease to be important or even relevant.

Is then the marine underwriter, in the event, free of liability for this sum, notwithstanding the collision clause in his policy? On this point I find myself in agreement with what I take to be the view of Bankes L.J. I think he is. The question turns entirely upon the meaning to be placed upon the introductory words of the clause: "If the ship hereby insured shall come into collision with any other ship or vessel." Is the collision there referred to confined to one which is a peril of the sea insured against by the policy, or does it extend to one, which, resulting from warlike operations, is put beyond the purview of the policy altogether by cl. 21, the f. c. and s. clause? As Lord Shaw pointed out when

this matter was last before the House, a "collision" in this policy may be either a sea risk covered by it or a war risk excluded from it. To which class of collision is reference made in this clause? My Lords, if it were not for the opposite view taken by others for whose opinion I have a profound respect, I should have thought the answer was plain. Whether the question be treated purely as one of construction of the policy as a whole, regardless of the history and purpose of the collision clause, or whether that history and purpose be also kept in mind, I should have thought that the reference clearly was to a collision, being a peril of the sea which is covered by the policy, and not to one with which the policy has no concern. A conviction that this is also the common sense view of the matter must not be allowed to darken counsel. But that conviction is, I confess it, strong.

The effect of a clause like the f. c. and s. clause, as explained by Lord Selborne in *Cory* v. *Burr* (1), is that the insurers are not to be liable for the things to which the warranty applies. Prima facie, therefore, any term in this policy which is sufficiently satisfied by reference to a risk for which the insurers retain liability must be so confined if the warranty is to have its intended effect. An interesting illustration of this, and in a matter immediately relevant, is supplied by cl. 13 of the Institute Time Clauses. That clause provides that "when the vessel shall have been stranded, sunk, on fire, *or in collision with any other vessel*"—note the identity of the phrase with that of the collision clause—"underwriters shall pay the damage created thereby." On this clause there is of course no question that this present collision being an excepted risk there is on the marine underwriters no liability at all in respect of that damage. The Crown has accepted liability for it in these present proceedings.

The view, however, is apparently taken that in this matter the collision clause is a law unto itself, upon a ground which is most clearly expressed by Greer J. in his judgment. There he says that the clause introduced "an additional contract of insurance dealing with an entirely new subject matter

(1) 8 App. Cas. 393.

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which has nothing to do with damage to the insured ship but is of the same character as a third party risk policy on a motor car or other vehicle moving on land. . . . . The f. c. and s. clause does not in my judgment free the insurer from the indemnity promised in the Institute Time Clauses in respect of collision occasioned by the negligence of servants of the insured owners even where that negligence takes place in the course of carrying out a warlike operation."

My Lords, I have some difficulty in following the reasoning here, because it does not appear to be directed to the terms of the clause with which in this case we are alone concerned. Unlike other forms of running down clause to be found in the books, and with which the learned judge's observations seem more directly to deal, there is no reference in this clause to the negligence of the servants of the insured owners or of anybody else. The sole preliminary condition of liability prescribed by the clause is that the insured vessel shall have been in collision with another vessel and that the insured person shall have paid or shall have become liable to pay damages in respect of that collision. The learned judge omits even to consider whether the collision so referred to can, in view of the f. c. and s. clause, have any meaning other than that which, for example and in pari materia, it admittedly bears in cl. 13 of these same Institute Time Clauses. The learned judge apparently treats the clause as if it were in a form similar to that under discussion in *Taylor* v. *Dewar* (1) and *Xenos* v. *Fox* (2), where liability is made to attach in case " by accident or negligence of the master or crew " the insured ship runs down another, a limited but at the same time independent form of expression.

My Lords, such is neither the form nor, I believe, the intent of the present clause. Nor ought its terms to be stressed to give it that effect. These are not limited but general ; not independent but, as I read them, relative and dependant. They reflect the original purpose of the collision clause, which certainly was not to attach liability to an insurer for damages unconnected with an insured risk. Its purpose was to extend

(1) 5 B. & S. 58. (2) L. R. 3 C. P. 630.

liability in respect of a peril of the sea insured against for a consequence which the Courts had held to be too remote to be recognized, but against which insured persons desired to be indemnified. In such a case, as Lord Blackburn observes, " the prejudice which the owner of the ship sustains . . . . is a consequence of the peril of the sea, the collision, and it may be and every day is insured by a running down or collision clause now in common use, but it is not a loss of the ship " : *Inman Steamship Co.* v. *Bischoff.* (1)

It is accordingly quite foreign to the conception of the clause that an insurer should under it be liable for collision damage to another ship when under the same policy he is under no liability for damage from the same collision to the insured ship : or that, to take the present case, he should be free from liability under cl. 13 of these clauses, but should, under the very same words, be hit under cl. 1. In my judgment, from whatever angle this clause be regarded, there is no room for the view that under it and in respect of this collision the marine underwriter is under any liability whatever.

If that be so, it follows, for the reasons already given, that the liability of the Crown for this sum is established, unless the provisions of the third sentence of cl. 19 of the charterparty are sufficient to show that the hypothesized war risk policy is to contain no collision clause at all. For convenience I again transcribe the sentence in question : " Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss, or if she be injured, on the ascertained value of such injury."

My Lords, I think that all of your Lordships at the hearing were of the opinion, at all events I myself hold the view very strongly, that that clause is merely operative to define the value of the *Warilda* in cases where it is material to ascertain it, and cannot be invoked to relieve the Admiralty from all liability in respect of damage sustained by the *Warilda* if, apart from that clause, such liability is upon the true view of the whole document undertaken by the Admiralty. It is not by such words of ambiguous import that you can

(1) (1882) 7 App. Cas. 670, 686.

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effectually neutralize the operation upon the war risk insurance of the admission that the collision clause is part of the marine risk.

For these reasons, my Lords, I am of opinion that the liability of the Crown in respect of the appellants' first claim is established.

Their second claim, also under the collision clause, is for three-fourths of the costs incurred or paid by the appellants in contesting the liability of the *Warilda* for the collision.

This claim, I think, is not sustainable. Such costs are, under the clause, only recoverable if the proceedings in question were taken "with the consent in writing" of the Admiralty. No such consent was given, probably, it may be, because the collision was then regarded by the Admiralty as a marine and not as a war risk. But, for whatever reason, the consent was not given, and accordingly the claims of the appellants for these costs must necessarily fail.

My Lords, the third claim of the appellants has greatly exercised my mind. It is for hire money during the period the *Warilda* was undergoing repair of the damage sustained by the collision. The hire was withheld by the Admiralty under cl. 25 of the charterparty, the terms of which are before your Lordships.

As I read that clause, it is in substance the complement of cl. 12, which places obligations upon the appellants in the following terms: "The owners shall provide and pay for all wages provisions . . . . and all other expenses in connection with the master, officers, engineers and crew . . . . for all deck and engine room stores . . . . for boats . . . . and for the maintenance of the steamer in a thoroughly efficient state in hull and machinery for and during the service."

My Lords, cl. 25 as I read it is, at all events primarily, pointed to cases in which the working of the steamer is suspended owing to causes for which as between the owners and the Admiralty the owners are responsible, and I have difficulty in seeing how it can properly be extended to cases where the suspension, as here, is attributable to a cause for which, in a question with the owners, the Admiralty is responsible.

And this was apparently the view of the Admiralty when in August, 1918, this claim was first made. It was rejected because, as was stated, "the vessel was inefficient owing to a marine risk, i.e., collision." I appreciate that answer, and my own view is that in principle it is right. But that principle concedes the appellants' case, for the result of your Lordships' previous decision is that the vessel was inefficient, not owing to a marine but to a war risk. Applying that principle could it, for instance, be contended that if the damage to the *Warilda* had been done, as was the damage to *The Ikaria* (1), by hostile submarine attack, the *Warilda* during the repair of that damage would under cl. 25 have been off hire? It seems to me that so to contend would stress the clause to breaking point. Yet, I have difficulty in finding any dividing line between such damage and that with which we are here concerned.

These are my difficulties, and they are not met by the statement, quite correct as it is, that the war risk policy is an insurance on ship and not on freight. Accordingly I have felt it my duty to express them in justice to the appellants. But having done so I do not further press them, as I understand all your Lordships are of opinion that the decision of the Courts below on this point should be affirmed.

I acquiesce in that view. But if, in other matters, the decision of this appeal had rested with me, I should, in common with my noble and learned friend who has just spoken, have allowed the first of the appellants' claims, with some consquential directions as to costs.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals. Dec. 11, 1925.

Solicitors for the appellants: *Parker, Garrett & Co.*
Solicitor for the respondent: *Treasury Solicitor.*

(1) [1918] A. C. 350.

[HOUSE OF LORDS.]

H. L. (E.)* BRIGHTON COLLEGE . . . . . APPELLANTS;

1925

AND

Dec. 18. MARRIOTT . . . . . RESPONDENT.

Revenue—Income Tax—Charity—Public School—Profits from School Fees—Profits or Gains from Trade—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 37, *sub-s.* 1 (*b*), *Sch. D.*

In 1873 Brighton College, which was founded in 1846 as a public school, was taken over by a company incorporated under the Companies Acts as a company limited by guarantee, the principal object of the company being to provide thereby a general education in conformity with the doctrines of the Church of England—an object admittedly charitable. The surplus income, after providing for the annual expenditure, was devoted to the improvement of the College and could not be divided in any way among the members of the company. For several years there had been a surplus of receipts over expenditure, and this surplus was mainly derived from fees charged for the education of the pupils. Upon an appeal by the company against an assessment to income tax under Sch. D in respect of this surplus, the Commissioners for the Special Purposes of the Income Tax Acts decided that a trade was being carried on and substantially affirmed the assessment:—

Held, that the company in providing education for money was carrying on a trade, notwithstanding that the whole purpose and object of the charity was the carrying on of the school, and that the surplus receipts, though applicable to the purposes of the charity, were profits or gains arising from a trade, and were chargeable to income tax under Sch. D.

Per Lord Blanesburgh. The question whether in any particular case the activities of a charity constitute a trade is a question of fact, and on the facts there was evidence to support the finding of the Commissioners.

Held, further, that the profits from the school fees were not exempt from taxation under s. 37, sub-s. 1 (*b*), of the Income Tax Act, 1918, as being an annual payment forming part of the income of a body established for charitable purposes only.

Decision of the Court of Appeal [1925] 1 K. B. 312 affirmed.

APPEAL from an order of the Court of Appeal (Pollock M.R., Warrington and Scrutton L.JJ.) reversing an order of Rowlatt J. upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts. (1)

* *Present:* VISCOUNT CAVE L.C., LORD ATKINSON, LORD BUCKMASTER, LORD CARSON, and LORD BLANESBURGH.

(1) [1925] 1 K. B. 312.

The following statement of facts is taken from the opinion of the Lord Chancellor :—

"The school known as Brighton College was founded in or about the year 1846 for the purpose of providing for the sons of noblemen and gentlemen a liberal and practical education in conformity with the principles of the Established Church, and was for some years conducted under the terms of a Deed of Establishment dated September 11, 1848. In the year 1873 the school was taken over by the appellant company, which was then incorporated under the Companies Acts as a company limited by guarantee, its principal objects being defined by the memorandum of association as follows :—

'(*a*) To continue with an improved constitution the Brighton College, which has been carried on since the year 1846 in Brighton.

(*b*) To provide thereby a sound religious, classical, mathematical, and general education, in conformity with the doctrines of the Church of England.'

The memorandum of association contained a provision to the effect that the income and property of the College, whencesoever derived, should be applied solely towards the promotion of the objects of the College as set forth in the memorandum of association, and no portion thereof should be paid or transferred directly or indirectly by way of dividend, bonus or otherwise by way of profit to the members of the College; and the Board of Trade, pursuant to s. 22 of the Companies Act, 1867, granted a licence for the registration of the company without the addition of the word 'limited' to its name. The articles of association provided (among other things) that every member should have the privilege of nominating to the College one pupil in respect of each share held by him, and that pupils not so nominated should pay an additional charge; but this privilege, although still in existence, is not now used by the members. The articles also provided that the Council should have the general care and management of the College and should regulate the tuition and other fees to be paid by the pupils.

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The school has been carried on by the appellant company in accordance with the memorandum and articles of association. The company has taken over or acquired the land required for the school and has improved the school premises, borrowing considerable sums for that purpose on mortgage or debentures. It employs a large staff and charges fees for the education given. The school is not assisted by any subscriptions, and there is nothing to show that the fees are fixed on other than commercial principles. For many years past the receipts of the College have considerably exceeded the working expenses, and the surplus has been applied to the payment of interest on the debt secured by the mortgages and debentures and of instalments of the principal debt. In the years 1912 to 1921 these surpluses were as follows :—

	Surplus.	Interest.	Principal paid off.
	£	£	£
1912 . . .	1633	1013	500
1913 . . .	1515	994	500
1914 . . .	1538	1108	500
1915 . . .	1371	1171	500
1916 . . .	1403	1151	500
1917 . . .	1781	1124	500
1918 . . .	1901	1095	500
1919 . . .	2142	1064	1000
1920 . . .	1729	1031	—
1921 . . .	6468	1310	500

In these circumstances the additional Commissioners of Income Tax for the division of Brighton made an assessment upon the appellants under Sch. D of the Income Tax Act for the tax year 1922–3; and, on an appeal to the Special Commissioners, those Commissioners decided that a trade was being carried on, and after giving effect to certain agreed alterations they amended the assessment to 2414*l.* and determined the appeal accordingly. It was agreed by both sides that in arriving at the liability of the appellant College under Sch. D, the annual value of the buildings and offices upon which no tax had been levied under Sch. A should be

deducted. A case having been stated for the opinion of the High Court, Rowlatt J. held that the appellants were not assessable to the tax, but on appeal to the Court of Appeal that Court reversed the decision of the High Court and affirmed the decision of the Special Commissioners. Hence the present appeal.

It should be added that, for the purposes of the argument before the Court of Appeal and this House, it was admitted by the Crown that the object for which the College was established was a charitable object within the meaning of the statute of Elizabeth."

1925. Nov. 3, 5, 6. *Latter K.C.* and *Edwardes Jones K.C.* (with them *Dighton Pollock* and *Beagley*) for the appellants. The question is whether a surplus of receipts over expenditure obtained by charitable trustees in administering their trust can be assessed to income tax under Sch. D. 1. A surplus of receipts over current expenditure in the hands of a body bound to administer a charitable trust is not a profit within the meaning of the Income Tax Acts. 2. Unless the appellants are carrying on a trade independently of their charitable activities they are not in receipt of any taxable income. 3. The appellants' only activity in the present case is the management of the College. The appellants do not contest the cases in which it has been held that charitable trustees who have power to carry on an independent trade are liable to income tax in respect of the profits of that trade, but here there is no separate activity; it is one administration of one charitable object. The College cannot make a trade out of its education, and if, under the guise of administering the trust, the appellants were to run the school on commercial principles they would be committing a gross breach of trust. Assuming that the carrying on of a trade is a question of fact, which is disputed, there is no evidence to justify the finding of the Commissioners, and that finding is inconsistent with the finding that the school has been carried on in accordance with the memorandum of association. Shortly, the appellants' case is that they are not entitled to carry on

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a trade, and that the business of providing education is not being run on commercial lines. Brighton College is not the less a charity because it is established as a school for the sons of noblemen and gentlemen, and the revenues applied to the general purposes of the College are applied to charitable purposes only and are exempt from income tax: *Attorney-General* v. *Lord Lonsdale* (1); *Rex* v. *Commissioners for Special Purposes of Income Tax; Ex parte University College of North Wales* (2); *Mary Clark Home* v. *Anderson* (3). *Religious Tract and Book Society of Scotland* v. *Forbes* (4), so far from being opposed to the appellants' contention, really supports it. There the society was carrying on two businesses —a bookseller's business and a colportage business. It was held that, though the object of the society was not that of making a profit, it might as incidental to its main purpose carry on a trade; that the bookseller's business was such a trade, but that the colportage business was not, because it was not carried on by commercial methods; and that consequently the losses on the colportage business could not be set-off against the profits of the bookseller's business in assessing the society to income tax in respect of its trade profits. If a charitable body carries on as a separate enterprise a trade which can be segregated from the charity, then no doubt it is liable to income tax in respect of the profits of that trade: *Grove* v. *Young Men's Christian Association* (5); *Coman* v. *Governors of the Rotunda Hospital, Dublin.* (6) But that is not this case. Here the appellants are engaged in administering a charitable trust, and the receipt of the school fees is incidental to that administration. That is not carrying on a trade: *Inland Revenue Commissioners* v. *Eccentric Club.* (7) *Mersey Docks* v. *Lucas* (8) merely decides that if profits are made in a trade it does not matter how they are applied. That is conceded, but it has no bearing on the question whether the

(1) (1827) 1 Sim. 105.
(2) (1909) 5 Tax Cas. 408; 24 Times L. R. 491.
(3) [1904] 2 K. B. 645, 652.
(4) (1896) 3 Tax Cas. 415; 23 R. 390.
(5) (1903) 4 Tax Cas. 613; 88 L. T. 696.
(6) [1921] 1 A. C. 1, 21, 24, 33–4.
(7) [1924] 1 K. B. 390, 415.
(8) (1883) 8 App. Cas. 891.

appellants are carrying on a trade. *In re Incorporated Council of Law Reporting for England and Wales* (1) also has no bearing on this question, because the Court was dealing with a body which had no raison d'être except the carrying on of a business. Further the appellants are exempt under s. 37, sub-s. 1 (*b*), from taxation under Sch. D in respect of the receipt of the school fees as being an annual payment forming part of the income of a trust established for charitable purposes only: *In re Janes' Settlement* (2); *Rex* v. *Special Commissioners of Income Tax* (the *Shaftesbury Homes* case). (3)

[They also referred to *Doe* v. *Bird* (4) as to the meaning of carrying on a trade.]

Sir Douglas Hogg A.-G. and *Reginald Hills* for the respondent. Before dealing with the specific facts of this case it is essential to keep in mind four general propositions—namely: (1.) That income tax is a tax on income; (2.) that there is no general exemption from income tax of charities as such, though they are entitled to certain specified exemptions under s. 37, sub-s. 1, of the Income Tax Act, 1918; (3.) that in determining whether any gain or profit is taxable or not the destination of that gain or profit is irrelevant; (4.) that on an appeal against an assessment the judges of fact are the Commissioners. In every case it is a question of fact for the Commissioners to determine whether the carrying on by a public body of the business of providing education is the carrying on of a trade. It is not necessary to contend that whenever a profit is made by a public school out of school fees that is a trade profit for the purposes of income tax. This governing body may under their memorandum and articles fix such fees as they choose, and the mere fact that this College is not subject to the rule against perpetuities does not conclude the question whether a trade is being carried on. Nor is the purpose for which a profit is made relevant to the question at issue—namely, whether it is a taxable profit: *Mersey Docks* v. *Lucas*, per Lord Selborne L.C. (5) The

(1) (1888) 22 Q. B. D. 279.
(2) [1918] 2 Ch. 54.
(3) [1923] 1 K. B. 393.
(4) (1834) 2 Ad. & E. 161, 166.
(5) 8 App. Cas. 891, 905.

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appellants are really seeking to maintain that because all the profits must be applied to the purposes of education they are excluded from taxation. As to the claim for exemption under s. 37, sub-s. 1 (*b*), *Trustees of Psalms and Hymns* v. *Whitwell* (1) shows that trading profits are not an annual payment within the meaning of the sub-section so as to be exempt from income tax when applied to charitable purposes.

Latter K.C. in reply. To determine whether there is an intent to carry on a trade one must look at the purpose at an earlier stage than the application of the profits, and in this case it must be said that the administration of the charity, i.e., the provision of education, is the carrying on of a trade. *Severn Fishery Board* v. *O'May* (2) applies by analogy. As to the determination of the Commissioners, when all the facts are found and the only question is whether the facts are such as to bring the case within the provisions of some statutory enactment, their determination is on a question of law and is open to review: *Farmer* v. *Cotton's Trustees*, per Lord Parker. (3) The question whether this College is carrying on a trade in the circumstances set out in the case is pre-eminently a question of law, and the determination of the Commissioners does not purport to be a finding of fact. The onus is on the Attorney-General to bring the case within Case 1 of Sch. D, by showing that the appellants are exercising a trade, and that onus he has failed to discharge.

The House took time for consideration.

1925. Dec. 18. VISCOUNT CAVE L.C. My Lords, in this case the Court of Appeal, reversing the decision of Rowlatt J., has held that the appellants, a corporation bearing the name of Brighton College, were properly assessed to income tax for the year ending on April 5, 1923, and the question for your Lordships' decision is whether the tax was rightly so assessed. [His Lordship stated the facts as given above.] My Lords, by the Income Tax Act, 1918, income tax is

(1) (1890) 3 Tax Cas. 7. (2) [1919] 2 K. B. 484.
(3) [1915] A. C. 922, 932.

chargeable under Sch. D in respect of the annual profits or gains arising or accruing to any person (including a corporation) residing in the United Kingdom from any trade, profession, employment or vocation. Exemption is granted (under s. 37) from (*a*) tax under Sch. A in respect of the rents and profits of any lands or hereditaments belonging to any public school, and (*b*) tax under Sch. D in respect of any yearly interest or other annual payment forming part of the income of any charity. A further allowance is made (under Sch. A, r. 6) in respect of the tax charged on any public school in respect of the public buildings, offices and premises belonging thereto; and by the Finance Act, 1921 (s. 30), exemption is granted from income tax under Sch. D in respect of the profits of a trade carried on by any charity, if the work in connection with the trade is mainly carried on by beneficiaries of the charity and the profits are applied solely to the purposes of the charity. Except in these respects the Acts grant no exemption from income tax to educational or other charities. In these circumstances the appellant company, which carries on the business of providing education for money, is prima facie chargeable with tax in respect of its annual profits or gains arising from that business; and the question to be determined is whether there is anything in the statute or in the constitution of the appellant company which prevents it from being so chargeable.

Upon this question two arguments are put forward on behalf of the appellant company.

First, it is said that the appellant company, being admittedly a charity, cannot carry on a trade, and that a surplus of receipts over expenditure arising in the execution of a charitable trust is not properly described as profit; and stress is laid on the fact that, having regard to the provisions of the company's memorandum of association, no part of its income can be distributed among the members. I am unable to agree with this contention. It has long been decided that, if a trade is in fact being carried on at a profit, it is immaterial that the profits must, under the constitution of the trading corporation, be devoted to public objects: *Mersey*

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Docks v. *Lucas* (1); cf. *In re Incorporated Council of Law Reporting.* (2) It has also been decided, both in the Courts and in this House, that a charitable institution which carries on a trade at a profit is chargeable with income tax in respect of its profits or gains in that trade, notwithstanding that they are and can only be applied to the purposes of the charity. Thus, in *St. Andrew's Hospital, Northampton* v. *Shearsmith* (3) a hospital for the care of insane persons was charged with income tax on the profits earned by receiving wealthy patients, although such profits were applied only for the benefit of the poorer patients and the improvement of the hospital. In *Religious Tract and Book Society of Scotland* v. *Forbes* (4) a society whose object was to promote religion by the circulation of tracts and books was held chargeable with tax in respect of profits earned by carrying on a bookseller's business. In *Grove* v. *Young Men's Christian Association* (5) a society formed for the improvement of young men was held liable to tax on profits made by carrying on a restaurant which was open to the public as well as to its members. And in *Coman* v. *Governors of the Rotunda Hospital, Dublin* (6) the governors of a hospital were held to have been rightly assessed to tax under Sch. D in respect of profits earned by letting certain rooms for entertainments. In all these cases the profits earned by the particular trade or business were applicable and applied only to the general purposes of the charities, but this was held to make no difference.

On behalf of the appellants, an endeavour was made to distinguish these cases from the present on the ground that in the cases cited the trades carried on were only subsidiary to the charitable purpose, while in the present case the carrying on of the school is the main purpose and object of the charity. I do not think this a sound distinction. If a corporation established for charitable purposes and carrying on a subsidiary trade for the benefit of its main objects is chargeable with tax, the tax is equally chargeable where the

(1) 8 App. Cas. 891.
(2) 22 Q. B. D. 279.
(3) (1887) 19 Q. B. D. 624.
(4) 23 R. 390; 3 Tax Cas. 415.
(5) 4 Tax Cas. 613.
(6) [1921] 1 A. C. 1.

very purpose and object of the charity is to carry on a trade. The surplus receipts in such a case, even if they were not profits, are certainly gains, and so fall under the burden of the tax. The above-cited case of the *Incorporated Council of Law Reporting* (1) supports this view; and the reference in s. 30 of the Finance Act, 1921, to "the profits of a trade carried on by any charity" shows the understanding of the Legislature.

But secondly it is argued that the profits from the school are exempt from taxation on the ground that they are an "annual payment forming part of the income" of the company, within the meaning of s. 37 of the Income Tax Act, 1918. The answer is twofold—namely, first, that the fees received from the scholars are not properly described as an annual payment: see *St. Andrew's Hospital, Northampton* v. *Shearsmith* (2), and secondly, that it is not sought to tax the fees but the profits. It was not suggested before your Lordships that the profits are within the exemption contained in s. 30 of the Act of 1921.

Upon the whole I have come to the conclusion that the appellants have been properly charged with tax. It has been suggested that a decision to that effect will throw a heavy charge upon many places of education, such as colleges and public schools, not carried on with a view to individual profit. I think this improbable. The real property and investments of these bodies are exempt from taxation; and the cases in which such a college or public school can show (as in the present case) a substantial profit earned year after year and applied for capital purposes, must be rare. In any case, your Lordships have only to determine the true construction of the statute, and upon this I do not feel any doubt. In my opinion the appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

LORD ATKINSON. My Lords, I have had the pleasure and advantage of reading the judgment which has just been delivered by my noble friend upon the Woolsack. I thoroughly concur, and have nothing to add.

(1) 22 Q. B. D. 279. (2) 19 Q. B. D. 628.

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LORD BUCKMASTER (read by LORD CARSON). My Lords, the detailed facts of this case have already been stated. But in order to make plain the principles which have formed my opinion it is desirable that I should summarize what I regard as the relevant matter.

Brighton College is carried on as an undertaking under the Companies Acts. The sole purpose of the company is to provide education at Brighton College in conformity with the doctrines of the Church of England, and this is wholly a charitable object. The surplus income after providing for the annual expense is devoted to the improvement of the institution, and cannot be divided in any way or under any pretence among the members of the company. The tax that it is sought to exact from these surplus profits is claimed by the Crown under Sch. D of the Act of 1918 as annual profits or gains arising from a trade carried on in the United Kingdom. If the purpose for which the school was established and the objects to which the surplus income is devoted be disregarded, the tax would, in my opinion, be properly charged, and the two questions on this appeal are first whether the circumstances I have stated prevent the carrying on of this institution from being a trade and, secondly, if this be answered in the negative, whether the exemptions under s. 37 of the Income Tax Act, 1918, and s. 30 of the Finance Act, 1921, will relieve the appellants from liability.

With regard to the first of these propositions it is, I think, clear that the purpose to which the profits are applied is not material. In *Religious Tract and Book Society of Scotland* v. *Forbes* (1) it was definitely decided that the destination of the profits does not secure immunity from tax, and this principle is, in my opinion, involved in the case of *Coman* v. *Rotunda Hospital, Dublin*. (2) It seems to me to make no difference so far as this point is concerned whether the trade from which the profits arose formed the whole or part only of the charity. The main argument, indeed, was in fact devoted to the contention that where the whole purpose of the undertaking was in fact the carrying on of the charity it ceased to be a

(1) 3 Tax Cas. 415. (2) [1921] 1 A. C. 1.

trade. I am unable to accept this proposition, although it found favour before Rowlatt J. and formed the basis of his judgment. If the undertaking must be regarded as a trade and would be so regarded if it formed a branch only of a larger institution, it seems to me it must equally be a trade when it is the sole and only purpose. In accordance, therefore, with authorities which have stood too long to be now revised, I think that this tax was properly charged under Sch. D.

It remains to be considered whether, in these circumstances, it is exempted. The relief granted by s. 37 of the Act of 1918 from tax is first under (*a*) in respect to the rents and profits of lands and tenements belonging to a public school or vested in trustees for charitable purposes, and this has been allowed. It must be under sub-s. (*b*) if anywhere that the relief must be sought. This grants exemption in respect of any yearly interest or other annual payment forming part of the income of any body established for charitable purposes only. This company certainly satisfies that condition. The only point is whether the surplus profits can be regarded as yearly interest or annual payment. It is certainly not interest, nor do I think it can be regarded as an annual payment, for an annual payment to a company cannot cover the profits that may be made in carrying on a trade. Nor can exemption be claimed under s. 30 of the Finance Act of 1921, for the work done by the masters and staff in carrying on the school is work done by them in the exercise of their various callings, and none of them can be regarded as beneficiaries of the charity.

It is for these reasons that I think the judgment of the Court of Appeal is correct and ought to be affirmed.

LORD CARSON. My Lords, I agree with the judgments already delivered and with the motion that has been proposed from the Woolsack.

LORD BLANESBURGH. My Lords, I agree that this appeal should be dismissed for reasons which I can state in very few words.

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Brighton College is none the less in legal language a charity, because it was established as a school for the sons of noblemen and gentlemen; nor does the institution lose its charitable character, nor do its activities become a trade occupation or business merely because fees are charged for the education which the scholars at the College receive: *Attorney-General* v. *Lord Lonsdale*. (1) Whether in any particular case activities which may properly be described as charitable have become trading or commercial must always be a question of fact—one important consideration being whether these activities are being conducted with commercial considerations in view and on commercial principles: see *Religious Tract and Book Society of Scotland* v. *Forbes*. (2)

Any hesitation which, in view of the decided cases on this subject, I have felt in relation to this appeal is attributable to the doubt I entertain whether the Commissioners when arriving at their finding that a trade is in fact being carried on by the appellants have had sufficient regard to the considerations to which I have referred.

While still dubious, and while myself holding the opinion that the taking of fees in such a case as the present does not by itself carry the question very far, I cannot affirm on the case as stated that there was no evidence to support the finding of the Commissioners to which I have just referred.

In these circumstances it is not open to me to criticize that finding, and accordingly I concur in the motion which has been proposed from the Woolsack.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, Dec. 18, 1925.

Solicitors for the appellants: *Lingards, Browne & Myatt.*
Solicitor for the respondent: *Solicitor of Inland Revenue.*

(1) 1 Sim. 105. (2) 3 Tax Cas. 415.

Dictum of VISCOUNT CAVE, L.C., at pp. 211, 212, *considered.* SMITH'S POTATO ESTATES, LTD. *v.* BOLLAND. [1948] 2 All E.R. 367.

[HOUSE OF LORDS.]

BRITISH INSULATED AND HELSBY CABLES, LIMITED . . . . . } APPELLANTS ;

AND

ATHERTON . . . . . RESPONDENT.

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Dec. 11.

Revenue—Income Tax—Trade Profits—Deductions—Lump Sum set aside out of Profits to establish Pension Fund for Employees—Trust Deed—"Money wholly and exclusively laid out . . . . for the purposes of the trade"—"Capital withdrawn from or any sum employed . . . . as capital in such trade"—Income or Capital Expenditure—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sch. D, Case I., rr.* 1 *and* 3; *Rules applicable to Cases I. and II., r.* 1.

A company, which carried on the business of manufacturers of insulated cables, established, under the powers of its memorandum of association, a pension fund for its clerical and technical salaried staff. The fund was constituted by a trust deed which provided that members should contribute a percentage of their salaries to the fund and that the company should contribute an amount equal to half the contributions of the members; and further that the company should contribute a sum of 31,784*l.* to form the nucleus of the fund and to provide the amount necessary in order that past years of service of the then existing staff should rank for pension. This sum was arrived at by an actuarial calculation on the basis that the sum would ultimately be exhausted when the object for which it was paid was attained. On the winding up of the fund the whole amount was to be distributed among the members. The company, having paid the sum of 31,784*l.* out of current profits, claimed that it was an admissible deduction in computing its profits for the purpose of assessment to income tax for the financial year 1917–18 :—

Held (by Viscount Cave L.C., Lord Atkinson and Lord Buckmaster; Lord Carson and Lord Blanesburgh dissenting), that this payment was in the nature of capital expenditure and was therefore not an admissible deduction.

Dictum of Lord Sumner in *Usher's Wiltshire Brewery* v. *Bruce* [1915] A. C. 433, 468 applied.

Hancock v. *General Reversionary and Investment Co.* [1919] 1 K. B. 25 distinguished.

Decision of the Court of Appeal [1925] 1 K. B. 421 affirmed.

APPEAL from an order of the Court of Appeal (Pollock M.R., Warrington and Scrutton L.JJ.) reversing an order of

* *Present :* VISCOUNT CAVE L.C., LORD ATKINSON, LORD BUCKMASTER, LORD CARSON, and LORD BLANESBURGH.

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Rowlatt J. on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts. (1)

The following statement of facts is taken from the opinion of the Lord Chancellor :—

"My Lords, the present appeal is concerned with the assessment of the appellants to income tax for the year ending on April 5, 1918, and the relevant facts appear in the case stated by the Commissioners for the Special Purposes of the Income Tax Acts. From that case it appears that the appellants (who are manufacturers of insulated cables) had a large clerical and technical staff, and that prior to the year 1916 they had not paid pensions to their employees retiring on account of old age. In or about that year, however, the appellant company (to quote the language of the case) 'found that it had frequently lost experienced members of its salaried staff who left to take up appointments elsewhere, and that the absence of a regular system of pensions was injurious to its business in other respects. It was therefore decided to establish under the powers given to the company by its memorandum of association a pension fund for its clerical and technical salaried staff, in the hope that the benefits to be derived from the fund would induce the members of its staff to remain in its service and otherwise increase the efficiency of the company's staff.' Accordingly, a pension fund for the staff was constituted by a trust deed dated August 8, 1916. By this deed each member of the existing staff who elected to join the fund undertook to contribute 5 per cent. of his salary to the fund, the older members of the staff not being called upon to pay any higher rate of contribution on account of their age. Persons joining the staff after the commencement of the fund were to contribute at the same rate if not above the age of forty at the time of joining the fund, but if above the age of forty the rate of contribution was increased. The company undertook to contribute to the fund an amount equivalent to one-half of the contributions of the members, and further undertook to pay the sum of 31,784*l.* to form the nucleus of the fund,

(1) [1925] 1 K. B. 421.

and to provide the capital sum necessary in order that past years of service of the then existing staff should rank for pension. The company also undertook to make up the income from the investments of the fund to a net income equal to 4 per cent. per annum free of tax. The benefits were to take the form (*a*) in the event of retirement at the age of sixty-five and in certain other circumstances, of a pension depending on the length of service, and (*b*) in other cases of a return of the members' contributions, with interest. The trustees of the fund had power to apply the income and, as far as necessary, the capital of the fund in payment of the benefits provided. Two of the trustees of the fund were to be appointed by the directors of the company, while the three other trustees were to be contributing members of the fund. In the event of the winding up of the fund, the whole of the amount was to be divided among the members, and the company was not to be entitled to recover any part of the contributions which it had paid.

The above mentioned sum of 31,784*l.* (which is the item giving rise to the appeal in this case) was arrived at by an actuarial calculation, and represented the estimated deficiency which might be expected to arise by reason of the admission to the pension fund of the older members of the existing staff without any additional contributions on account of their age. The date when this sum was actually paid to the trustees of the fund is not stated, but probably it was paid at some time in the year 1916, after the execution of the deed.

In these circumstances the question arose whether in computing for the purposes of income tax the profits of the company for the tax year 1917-18 (which had of course to be based upon its profits for the three preceding years) the above mentioned sum of 31,784*l.* should be deducted from its receipts. The Commissioners held, on the authority of the case of *Hancock* v. *General Reversionary and Investment Co.* (1), that this sum was an admissible deduction, and on the hearing of the case stated by them their decision was affirmed by

(1) [1919] 1 K. B. 25.

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Rowlatt J.; but on appeal to the Court of Appeal the decision was reversed, and it was held that the deduction could not be allowed. Hence the present appeal."

1925. Oct. 22, 23, 26. *Sir John Simon K.C.* and *Latter K.C.* (with them *Hildesley*) for the appellants. 1. This sum is money laid out wholly and exclusively for the purposes of the appellants' trade. 2. It is not capital withdrawn from the appellants' trade or a sum intended to be employed as capital in their trade. It is therefore not within either of the statutory prohibitions contained in the first rule of the Rules of Cases I. and II., or in the third rule of the Rules of Case I. of Sch. D of the Income Tax Act, 1842. As to 1. For purposes of income tax in order to ascertain the balance of profits and gains arising from a trade there must be set against trade receipts all appropriate trading disbursements and liabilities and, although the Act contains no express allowance of deductions, any deduction which is proper and necessary for that purpose ought to be allowed unless it falls within one or other of the statutory prohibitions: *Gresham Life Assurance Society* v. *Styles* (1); *Usher's Wiltshire Brewery* v. *Bruce.* (2) The latter case also shows that in determining whether a sum is wholly and exclusively laid out for the purposes of the trade it is not an objection that the payment is gratuitous or that there may be an actual liability on another to make it. The appellants, as appears from the case, found that the want of a regular system of pensions was injurious to their business, and they established this pension fund, and made this contribution to it, in order to retain the services of their skilled employees and to increase the efficiency of their staff. It was therefore an ordinary trade expenditure.

[LORD BLANESBURGH referred to *Hampson* v. *Price's Patent Candle Co.* (3) and *Hutton* v. *West Cork Ry. Co.* (4)]

As to 2. There is no question of withdrawing capital from the trade, as the payment was made out of profits, nor is

(1) [1892] A. C. 309, 317.
(2) [1915] A. C. 433, 458.
(3) (1876) 45 L. J. (Ch.) 437.
(4) (1883) 23 Ch. D. 654.

this sum of money employed as capital in the trade, unless it is represented by a fixed capital asset. When a continuous and recurrent business demand is extinguished by a lump sum payment without creating an asset, the money so paid is not employed as capital in the trade within the meaning of the rule, but is an ordinary business expense and is a permissible deduction. It is not the less a revenue expenditure because it is made once for all. It is the pension in another form; it is actuarially equivalent in value and it is identical in character: *Hancock* v. *General Reversionary and Investment Co.* (1) That case was rightly decided and controls the decision in this case.

Rowntree & Co. v. *Curtis* (2), where *Hancock's* case (3) was treated by the Court of Appeal as right, is distinguishable. There the fund was to provide a permanent charitable trust the income of which would be sufficient to meet the demand. It is difficult to say in that case that the payment represented the liability in another form. The company were not there trying to measure a liability and redeem it by a payment, but the sum expended was really a capital outlay. On the other hand a thing which in its nature would be a revenue charge if paid by a series of instalments does not cease to be so because it is paid in one lump sum.

Sir Douglas Hogg A.-G. and *Reginald Hills* for the respondent. The expenditure of this sum for the purpose of forming the nucleus of the pension fund was not in its nature recurrent, but was made once for all. There is here a provision of a capital sum which will for ever after relieve the company from making any further payment whatsoever. That is an expenditure for a capital purpose within the meaning of the rule, and is therefore not a permissible deduction. It is an application of the profits of the year to prevent a trade expense arising hereafter; it cannot be treated as a trade expense of the year in which it was paid. In *Vallambrosa Rubber Co.* v. *Farmer* (4) Lord Dunedin

(1) [1919] 1 K. B. 25, 37.
(2) [1925] 1 K. B. 328.
(3) [1919] 1 K. B. 25.
(4) 1910 S. C. 519, 525; 5 Tax Cas. 529, 536.

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thought it was not a bad criterion, roughly speaking, of what was capital as distinguished from income expenditure to say that capital expenditure was a thing that was going to be spent once for all and income expenditure a thing that was going to recur every year. This particular deduction is not justified by any case on the books except possibly *Hancock's* case (1), which is an extension of the general principle.

[They also referred to *Ounsworth* v. *Vickers, Ld.* (2); *Coltness Iron Co.* v. *Black* (3); *Granite Supply Association* v. *Kitton* (4); *Southwell* v. *Savill Brothers* (5); *A. G. Moore & Co.* v. *Hare* (6); *Merlimau Rubber Estates* v. *Inland Revenue Commissioners.* (7)]

Latter K.C. in reply referred to *Watson* v. *Royal Insurance Co.* (8)

The House took time for consideration.

1925. Dec. 11. VISCOUNT CAVE L.C. [after stating the facts:] My Lords, the material sections of the Income Tax Acts may be shortly stated. By the rules for ascertaining the duties to be charged in respect of a trade or manufacture under Sch. D of the Income Tax Act, 1842 (which was in force when the assessment in question was made), it was provided (by Case I., r. 1) that the duty to be charged in respect thereof should be computed on a sum not less than the full amount of the "balance of the profits or gains" of such trade or manufacture upon an average of three years, and should be assessed, charged, and paid "without other deduction than is hereinafter allowed"; (by Case I., r. 3) that in estimating the balance of profits and gains of a trade or manufacture so chargeable, no sum should be deducted from such profits or gains "on account of any capital withdrawn therefrom; nor for any sum employed or

(1) [1919] 1 K. B. 25.
(2) [1915] 3 K. B. 267.
(3) (1881) 1 Tax Cas. 287, 307.
(4) (1905) 8 F. 55; 5 Tax Cas. 168.
(5) [1901] 2 K. B. 349.
(6) 1915 S. C. 91; 6 Tax Cas. 572.
(7) [1923] A. C. 283.
(8) [1896] 1 Q. B. 41, 45, 46; [1897] A. C. 1, 8, 9.

intended to be employed as capital in such trade, manufacture, adventure, or concern"; and (by Cases I. and II., r. 1) that no sum should be deducted "for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure, or concern." It was also enacted (by s. 159) that in the computation of duty to be made in any of the cases mentioned in the Act it should not be lawful to make any other deductions than such as were expressly enumerated in the Act.

With reference to the provision last mentioned, and to the similar injunction contained in r. 1 of Case I., it has been pointed out on several occasions, and particularly by Scrutton J. in *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (1) and by Lord Parker and Lord Sumner in *Usher's Wiltshire Brewery* v. *Bruce* (2) that the Act does not contain any express allowance or enumeration of deductions; and that effect can only be given to these provisions by holding that, when a deduction is proper to be made in order to ascertain the balance of profits and gains for any year, it ought to be made notwithstanding the first rule applicable to Case I. and s. 159, provided that it is not prohibited by the terms of the Act and Rules. From this it follows that in determining whether a particular item may or may not be deducted from profits, it is necessary first to inquire whether the deduction is expressly prohibited by the Act, and then, if it is not so prohibited, to consider whether it is of such a nature that it is proper to be charged against incomings in a computation of the balance of profits and gains for the year.

My Lords, I think it clear that the deduction from the profits of the above-mentioned sum of 31,784*l.* is not prohibited by the first rule applicable to Cases I. and II., which prohibits the deduction of a disbursement not being money wholly and exclusively laid out or expended for the purposes of the trade. It was made clear in the above cited cases of

(1) [1914] 3 K. B. 674, 681. (2) [1915] A. C. 433, 458, 467.

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Usher's Wiltshire Brewery v. *Bruce* (1) and *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (2) that a sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade; and it appears to me that the findings of the Commissioners in the present case bring the payment in question within that description. They found (in words which I have already quoted) that the payment was made for the sound commercial purpose of enabling the company to retain the services of existing and future members of their staff and of increasing the efficiency of the staff; and after referring to the contention of the Crown that the sum of 31,784*l.* was not money wholly and exclusively laid out for the purposes of the trade under the rule above referred to, they found that the deduction was admissible—thus in effect, although not in terms, negativing the Crown's contention. I think that there was ample material to support the findings of the Commissioners, and accordingly that this prohibition does not apply.

Nor, in my opinion, is the prohibition contained in the third of the rules applicable to Case I. directly in point. The 31,784*l.* was not "capital withdrawn" from the trade, for it was not paid out of capital but out of the incomings of the year; nor was it (strictly speaking) a sum "employed or intended to be employed as capital in" the trade, for it did not remain in the company's hands but was irrevocably paid away to the trustees of the pension fund. It follows that, in my opinion, the express prohibitions contained in the statute, although they may throw some light upon the intention of the Legislature, do not in terms apply.

But there remains the question, which I have found more difficult, whether, apart from the express prohibitions, the sum in question is (in the words used by Lord Sumner in *Usher's*

(1) [1915] A. C. 433. (2) [1914] 3 K. B. 674.

case (1)) a proper debit item to be charged against incomings of the trade when computing the profits of it; or, in other words, whether it is in substance a revenue or a capital expenditure. This appears to me to be a question of fact which is proper to be decided by the Commissioners upon the evidence brought before them in each case; but where, as in the present case, there is no express finding by the Commissioners upon the point, it must be determined by the Courts upon the materials which are available and with due regard to the principles which have been laid down in the authorities. Now, in *Vallambrosa Rubber Co.* v. *Farmer* (2) Lord Dunedin, as Lord President of the Court of Session, expressed the opinion that "in a rough way" it was "not a bad criterion of what is capital expenditure—as against what is income expenditure—to say that capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing that is going to recur every year"; and no doubt this is often a material consideration. But the criterion suggested is not, and was obviously not intended by Lord Dunedin to be, a decisive one in every case; for it is easy to imagine many cases in which a payment, though made "once and for all," would be properly chargeable against the receipts for the year. Instances of such payments may be found in the gratuity of 1500*l.* paid to a reporter on his retirement, which was the subject of the decision in *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (3), and in the expenditure of 4994*l.* in the purchase of an annuity for the benefit of an actuary who had retired, which, in *Hancock* v. *General Reversionary and Investment Co.* (4), was allowed, and I think rightly allowed, to be deducted from profits. But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an

(1) [1915] A. C. 468.
(2) 1910 S. C. 519, 525; 5 Tax Cas. 529, 536.
(3) [1914] 3 K. B. 674.
(4) [1919] 1 K. B. 25.

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expenditure as properly attributable not to revenue but to capital. For this view there is already considerable authority. Thus, moneys expended by a brewing firm with a view to the acquisition of new licensed premises: *Southwell* v. *Savill Brothers* (1); "flitting expenses" incurred in transferring a manufacturing business to new premises: *Granite Supply Association* v. *Kitton* (2); costs incurred in promoting a Bill which was dropped on the desired facilities being obtained by agreement: *A. G. Moore & Co.* v. *Hare* (3); and expenditure incurred by a shipbuilding firm in deepening a channel and creating a deep water berth (not on their own property) to enable vessels constructed by them to put out to sea: *Ounsworth* v. *Vickers, Ld.* (4), have been held to be in the nature of capital expenditure and not to be deductible under the Income Tax Acts; and *Rowntree & Co.* v. *Curtis* (5) is to the same effect. I think that the principle to be deduced from this series of authorities rests on sound foundations and may properly be adopted by this House.

My Lords, in my opinion the present case falls within the same principle. The payment of 31,784*l.*, which is the subject of dispute, was made, not merely as a gift or bonus to the older servants of the appellant company, but (as the deed shows) to "form a nucleus" of the pension fund which it was desired to create; and it is a fair inference from the terms of the deed and from the Commissioners' findings that without this contribution the fund might not have come into existence at all. The object and effect of the payment of this large sum was to enable the company to establish the pension fund and to offer to all its existing and future employees a sure provision for their old age, and so to obtain for the company the substantial and lasting advantage of being in a position throughout its business life to secure and retain the services of a contented and efficient staff. I am satisfied on full consideration that the payment was in the nature of capital expenditure, and accordingly that the deduction of the amount from profits,

(1) [1901] 2 K. B. 349.
(2) 8 F. 55; 5 Tax Cas. 168.
(3) 1915 S. C. 91; 6 Tax Cas. 572.
(4) [1915] 3 K. B. 267.
(5) [1925] 1 K. B. 328.

although not expressly prohibited by the Act, was rightly held by the Court of Appeal not to be admissible.

For these reasons I move your Lordships that this appeal be dismissed with costs.

LORD ATKINSON. My Lords, the facts of this case have been already fully stated. I abstain from repeating them save so far as may be necessary to make my judgment intelligible. I am of opinion that the sum of 31,784*l.* paid by the appellants to the trustees of the trust deed of August 8, 1916, to be employed by them in the manner, for the objects, and under the conditions in the deed set forth, was money wholly and exclusively laid out and expended for the purposes of the appellants' trade, manufacture, adventure or concern, within the meaning of the first rule applicable to Cases I. and II. under Sch. D, s. 100, of the Income Tax Act of 1842, and therefore that the deduction of this sum from the balance of the gains and profits of the appellants' trade, realized in the years in which the payments were made, was not prohibited by this rule. But a careful examination of the provisions of the trust deed, coupled with the facts found, has convinced me that the payment of this large sum of money to these trustees for the purposes of the trust amounted to an actual employment or intended employment of it as capital in the appellants' trade, manufacture, adventure or concern within the meaning of the third rule of Case I. of Sch. D, quite as much as if it had been devoted to the purchase in fee of recreation fields or bath houses to improve the health of their staff, or of a library to increase their knowledge or discipline their minds. The use and enjoyment of these last-named things by the staff might not unnaturally make them more contented, more attached to their employers' service, and consequently more efficient than they otherwise would have been, and their employers would in this way be rewarded for their outlay; but if a portion of the profits and gains of the employers' trade and business, received in the year in which those things were acquired, was devoted to their acquisition it would, prima facie, I think, lead to an employment of their

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cost as capital, or an intended employment of it as capital, the deduction of which from the above mentioned profits and gains for income tax purposes is prohibited by this r. 3 of Case I., Sch. D, of the Income Tax Act of 1842.

The authorities do not supply any clear, precise, and sufficiently comprehensive definition of the operation styled a capital investment for the purposes of the Income Tax Acts. In the case of the *Royal Insurance Co.* v. *Watson* (1), the appellant company were by statute empowered to acquire and, in fact, did acquire from the Queen Insurance Co., their whole undertaking, which was regularly transferred to the purchasing company on August 19, 1891. The agreement into which the two companies had entered for this purpose provided, amongst other things, that the purchasing company should, until the transfer was completed, retain in their service the former manager of the Queen Insurance Co. at a salary of 4000*l.* per annum. Liberty was reserved, however, to the purchasing company to commute this salary by payment of a bulk sum calculated on the basis of certain tables in the agreement mentioned. The purchasing company availed themselves of this liberty and, shortly after the manager had been taken into their service, commuted this salary by payment to him of the sum of 55,846*l.* 8*s.* 5*d.* The Royal Insurance Co. contended that they were entitled, in fixing the amount of their liability to assessment for income tax for the year ending April 5, 1893, to deduct this large sum from the gains and profits of the business for the year 1891-1892, the year in which the payments had, in fact, been made. The Court of Appeal held that the company was not entitled to make this deduction, and on appeal to this House that decision was affirmed on the ground that this large sum of money was, in reality, part of the consideration to be paid by the purchasing company to the vending company for the transfer by the latter to the former of the latter's business, and was, therefore, money employed as capital within the meaning of the aforesaid r. 3. Lord Halsbury, in delivering judgment, said (2): "It is often a very difficult question to ascertain, in dealing with a

(1) [1897] A. C. 1; [1896] 1 Q. B. 41. (2) [1897] A. C. 6.

commercial account, what is capital and what is income; but if it is established as a fact that the expenditure is capital, the language of the statute itself determines that that expenditure cannot be deducted from the profits, and that the profits are to be ascertained without reference to the capital expenditure."

It was, as I understood, suggested in this case during the argument of this appeal that the sum of 31,784*l.* paid by the appellant company to the trustees of the trust deed of August 8, 1916, was precisely of the same nature and character as the 2½ per cent. of the aggregate amount of the subscriptions of the members of the appellants' staff to the pension fund, paid monthly by the appellants to the trustees, and as this monthly payment was obviously a recurring payment and not capital expenditure, so must the payment of the sum of 31,784*l.* be treated as a recurring payment, though, in fact, made once for all. One of the two principal questions raised upon the appeal, however, is whether the payment made once and for all of this large sum to secure the solvency of the pension fund amounts to a real or intended employment of capital. I am quite unable to see how the recurring monthly payment by the same company of a sum—possibly varying in amount from month to month—can infect, as it were, the payment of the larger sum, so as to convert the payment of each into matters of the same nature and character.

Lord Herschell concurred with Lord Halsbury. Referring to the sum of between 50,000*l.* and 60,000*l.* paid to the former manager, he said (1) it was "a payment made in pursuance of the obligation contained in the contract by which the business of the Queen Insurance Co. was purchased, and, therefore, is properly capital expenditure." Lord Macnaghten held that the payment of this same large sum was a payment on account of capital, and Lord Davey held that it, in fact, formed part of the consideration for the purchase of the company's business and connection, and that being so, the point was sufficient for the decision of the case. It will be observed that no question was raised as to the source from which the sum paid to the manager was obtained, no suggestion was made that it was

(1) [1897] A. C. 8.

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obtained from capital withdrawn from the business of the appellants. The natural conclusion from the reports of the case would appear to be that it was paid out of the gains and profits of the year in which the payment was made.

In the argument of the present appeal your Lordships' attention was not drawn to any case in which what was claimed to be a precise, full and accurate definition of the phrase capital expenditure was given. Lord Dunedin, however, in *Vallambrosa Rubber Co.* v. *Farmer* (1), when dealing with the expenses incurred every year in weeding and tending certain rubber trees on the lands of the company, which trees had not reached the rubber bearing age, said: "I do not say that this consideration is absolutely final or determinative, but in a rough way I think it is not a bad criterion of what is capital expenditure—as against what is income expenditure—to say that capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing that is going to recur every year." This rough test (Lord Dunedin did not pretend it was more than that) has been approved in many cases as, though a rough, yet an effective test, and I cannot find any case in which it has been disapproved of. In *Ounsworth* v. *Vickers, Ld.* (2) Rowlatt J. appears to have approved of and adopted it, saying, however: "I take it, and indeed both sides agree, that no stress is there laid upon the words 'every year': the real test is between expenditure which is made to meet a continuous demand, as opposed to an expenditure which is made once for all."

Much assistance is not to be gained in this case from the judgment of Scrutton J. (as he then was), in the case of *Smith* v. *Incorporated Council of Law Reporting for England and Wales.* (3) The question for decision there related to a gratuity of 1500*l.* given by the respondent society to a member of their reporting staff on his retirement after long service. The Commissioners had held that this sum of 1500*l.* was allowable to the respondents as a business expense in calculating for income tax purposes the profits of the year in which it was

(1) 1910 S. C. 519, 525; 5 Tax Cas. 529, 536.

(2) [1915] 3 K. B. 267, 273.

(3) [1914] 3 K. B. 674.

paid. On a case stated by the Commissioners it was held by Scrutton J. that the question whether this sum could be deducted from the respondents' profits as being "money wholly and exclusively laid out for respondents' business" within the meaning of r. 1 applying in the First and Second Cases under Sch. D, was a question of fact for the Commissioners to decide, and that as there was evidence before them adequate to support their finding of fact their decision was not a matter which could be reversed upon appeal, even although the appellate tribunal might itself have come to a different conclusion upon the evidence given.

In *Usher's Wiltshire Brewery* v. *Bruce* (1) the tenants of the appellant's tied houses were under their agreement bound to repair their houses and to pay certain rates and taxes. They failed to do so. The appellant company, though in no way legally or morally bound to do so, paid for these repairs, and paid these rates and taxes. They did so, not as a matter of charity but of commercial expediency, in order to avoid the loss of their tenants, and consequently the loss of the market for their beer, which they had acquired those houses for the purpose of affording. It was held that, though the appellant company were not legally or morally bound to make those payments, yet they were, in estimating the balance of the profits and gains of their business for the purposes of assessment of income tax, entitled to deduct all the sums so paid by them as expenses necessarily incurred for the purposes of their business. There is no suggestion in the present case that the appellant company were bound by a similar necessity to pay the sum of 31,784*l.* or any portion of it to the trustees to carry out the pension scheme.

I now turn to the trust deed of August 8, 1916. First the payment of the sum of 31,784*l.* was made once for all. It was made to secure that the pension fund should be adequate to meet the claims of the older members of the staff on their retirement before the contributions of all the contributors had amounted to a sum adequate to meet those claims—a laudable object, no doubt, and perhaps a prudent one in the interest of

(1) [1915] A. C. 433, 456, 466.

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the company's trade. Second, it was optional with the eligible members of the appellant's staff to join the scheme, as it is styled, or not, even if their respective salaries amounted to 100*l.* per annum. From the salary of every member who joined 5 per cent. was to be deducted by the company monthly and paid over monthly to the trustees of the deed to be added to the pension fund. In addition, as I have already pointed out, the company paid monthly to the trustees for the same purpose $2\frac{1}{2}$ per cent. of the aggregate amount of these contributions. These are the only recurring payments made to the credit of the pension fund. They are, I think, irrelevant to the question for decision touching the payment of the larger bulk sum. Next the appellant company are, by the terms of the deed, almost altogether deprived of all direction or control over the management, administration or application of the pension fund. So much is that the case, that by the 23rd clause of the deed it is provided that if a resolution should be passed or an order made for the winding up of the company and neither the Government nor any other company or body should within six months from the date of the resolution or order undertake the obligations of the company under the deed, two actuaries are to be appointed, one by the directors' trustees and the other by the staff's trustees, who are to decide in what manner the fund (i.e., the pension fund) should be divided among the members of the fund or such of them as shall be living or in receipt of retiring pensions, the first charge upon the fund being the return to the members of all sums contributed by them with interest at 4 per cent. The decision of these actuaries, it is provided, is to be final and binding on all parties concerned. The fund is not treated as part of the assets of the company. The debts of the company due to their creditors are not to be satisfied out of it to any extent. Again, the trustees have absolute power to invest all money in their hands, not required for the time being in making payment of pension, in such securities as they may deem fit. They are empowered to pay the pensions allowance as far as may be necessary out of the capital of the fund. There is to be an actuarial valuation of the position of the company every five

years from January 1, 1916, or at such other period as the trustees may determine. If, as a result of the actuaries' report, there should appear to be a surplus beyond the requirements of the fund, that surplus or any part of it may be set aside and invested by the trustees as a reserve fund. If, on the other hand, there should appear to be a deficiency, that is to be made good in such manner as the trustees may determine. By the 14th clause it is provided that the business of the trust is to be managed by the trustees or a majority of such of them as may be present at their meetings, and all powers, expressly or by implication given to the trustees, may be exercised by this majority. The trust deed contains many other provisions supporting the conclusion that the company have once and for all parted with all proprietary rights in and all powers over this donation of 31,784*l.*

It is difficult to see on what principle the company are, for the purposes of the assessment of income tax for the year in which the payment was made, entitled to deduct it from their profits and gains for that year, since it cannot, I think, be regarded as forming part of the cost by which those profits and gains have been acquired, nor as an expenditure which, however prudent from the employers' point of view, was essentially necessary for the acquisition in that, or any subsequent year, of any portion of the profits and gains of the appellants' business. It would certainly appear to me not to be—to adopt Lord Sumner's phrase used by him in his judgment in *Usher's Wiltshire Brewery* v. *Bruce* (1)—" a proper debit item to be charged against incomings of the trade when computing the balance of profits of it." That is apparently the view of it taken by Warrington L.J. He said (2) : " The real question I think which we have to determine is whether this is a proper debit item to be charged against the incomings of the trade when computing the balance of profits of it." He held it was not a proper debit item. Scrutton L.J., after pointing out that the Attorney-General's definition of capital expenditure, namely, " Any money expended upon a business which is intended to and does result in an asset is capital,"

(1) [1915] A. C. 433, 468. (2) [1925] 1 K. B. 435, 440, 441.

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cannot apply to the circulating capital of a trade or business, holds that the payment of this large sum of 31,784*l.* by the company, which they were not under any liability to make, was either a withdrawal of capital from the business for the purposes of the fund, or capital employed in creating an asset or advantage in the business, something added to the business not in discharge of any existing liability but, in the result, creating a new asset. If the word " asset," as used in this connection, be confined to something material—and I do not think it well can be so confined—then I am inclined to agree with Scrutton L.J., that, if the existence of this pension fund results in making the staff of the company more contented and less inclined to change their service and therefore, on the whole, more efficient, these results when secured would amount to an " asset " of the company's business. The Master of the Rolls expresses the same idea at the end of his judgment, in the following words (1) : " It appears to me that when you consider what is the nature of this payment, not for the purpose of meeting an existing, an actual liability, but only for the purpose of, in a very general way, improving the position of the staff, the right attribute to apply to this is that it was a payment made as and for the purpose of a capital outlay and cannot be deducted from the revenue as payment made in the course of seeking profits and gains." *Rowntree's* case (2) is quite distinguishable from this.

In the case of *Hancock* v. *General Reversionary and Investment Co.* (3) Lush J. said : " In *Ounsworth* v. *Vickers, Ld.* (4), Rowlatt J., following a judgment of the Lord President in *Vallambrosa Rubber Co.* v. *Inland Revenue Commissioners* (5), said that the proper test to apply is this : Was the money paid to an insurance company to purchase an annuity for an actuary long in their service, an expenditure incurred in order to meet a continuing business demand, in which case it would be treated as an ordinary business expense a deduction of which was admissible, or was it an expenditure incurred once

(1) This passage is quoted from the appendix.

(2) [1925] 1 K. B. 328 ; 8 Tax Cas. 678.

(3) [1919] 1 K. B. 25, 37.

(4) [1915] 3 K. B. 267.

(5) 1910 S. C. 519.

for all, in which case it should be treated as a capital outlay ? I agree with that view, and applying that test I think that it necessarily follows . . . . that the 4994*l.* should be treated, as the pension was treated, as an ordinary business expense, and that the deduction should be allowed. It is the pension in another form ; it is actuarially equivalent in value and it is identical in character. It was paid to meet a continuing demand which was itself an ordinary business expense as the surveyor had treated it." I cannot find that this reasoning was ever expressly approved of in any authority. The learned judge apparently treats the payment of this large sum as if it were made by the company to one of its employees. Little assistance is to be got from *Rowntree's* case (1) and other cases owing to the special findings of the Commissioners on several questions of fact. On the whole I think the judgment appealed from was right and should be affirmed and this appeal be dismissed with costs.

LORD BUCKMASTER. My Lords, the facts in this case have already been stated, they do not admit of ambiguity and their repetition is needless. The sole question for decision is whether the contribution of 31,784*l.* made for the purpose and in the circumstances already narrated can be deducted from the profits earned by the appellants in their business for the year ending April 5, 1918. The determination of this question depends upon the true meaning of the rules in Sch. D to the Act of 1842. The first and paramount provision is : that the duty to be charged shall be computed on a sum " not less than the full amount of the balance of the profits and gains " of the trade on a fair and just average for three years. In ascertaining this result there are certain restrictive conditions imposed by the succeeding rules—one prevents any deduction for any disbursements " not being money wholly and exclusively laid out or expended for the purposes of the trade," and another prevents allowance on account of capital withdrawn from the trade, or " for any sum employed or intended to be employed as capital in such

(1) [1925] 1 K. B. 328 ; 8 Tax Cas. 678.

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trade." It is, I think, plain upon the findings of fact of the Commissioners that the moneys in question in this case were exclusively laid out for the purposes of the trade—this view is emphatically asserted by Warrington L.J. and assented to by the Master of the Rolls. No difficulty arises in this connection. Whether this money should be treated as capital withdrawn from the business or intended to be employed as capital in the business, it is not, in my opinion, necessary to decide, for I agree with Warrington L.J. that the real difficulty lies in considering whether the deduction can be made in arriving at the full amount of the balance of profits and gains. In order to examine this question it appears to me that the different contributions to the scheme are not really material—the principle involved would be the same if there were no contributions other than those provided by the employers themselves and they had started and financed this scheme at their own sole cost. So tested I cannot think that this sum, which represents an amount set apart as the nucleus of the pension fund, can be properly deducted in determining the balance of the profits and gains. Authorities appear to me to be of little assistance ; the *Rowntree* case (1) is different, as the money there was set apart for charitable trusts in which ultimately others than those connected with the business might become the beneficiaries ; and the *Hancock* case (2) is nothing but the payment in one sum of an annually recurring liability and is closely analogous to the case of the *Incorporated Council of Law Reporting*. (3) But neither in their facts nor in their reasoning does it seem to me that these authorities govern the present case.

In my opinion this appeal should be dismissed.

LORD CARSON. My Lords, it was not contended, nor in face of the findings of the Commissioners could it have been successfully argued, that the sum in question was not money "wholly and exclusively laid out or expended for the purposes of the trade," and indeed it is under modern views and conditions not only a proper

(1) [1925] 1 K. B. 328. (2) [1919] 1 K. B. 25.
(3) [1914] 3 K. B. 674.

but essential expenditure for carrying on any properly organized business ; and that being so the question which has to be determined is whether it is a proper legal deduction to be made in arriving at the " full amount of the balance of profits and gains." Of course, as Lord Buckmaster points out, if the sum in question cannot be properly deducted in determining the balance of profits and gains, there is no necessity to consider whether this money should be treated as capital withdrawn from the trade or intended to be employed as capital in the trade. But as I do not take the same view of this expenditure as my noble friend, I think it necessary to state that I can find no grounds (and here I find myself in agreement with the noble Viscount on the Woolsack) for holding that the sum in question comes within either of the said categories. It is clear from the terms of the trust deed, as already pointed out, that in no sense was the sum an investment, that it would be eventually exhausted in payment of the pensions, and that in the event of a winding up of the company it could never form any part of the assets of the company. I cannot, under these circumstances, conceive any system of commercial accountancy under which this sum could ever appear in the capital accounts of the company. Nor is it capital withdrawn from the business, as it was admittedly paid out of the earnings of the year. It is not disputed that an annual sum contributed to the pension fund on an actuarial basis for the purposes of making the fund solvent for paying the pensions of the older members of the staff would be a proper deduction in arriving at the balance of profits and gains, it would be an ordinary business expense. Nor, I think, can it be disputed that if at any time the fund threatened to become insolvent after it was started a sum paid to prevent such insolvency would be a proper disbursement in arriving at the balance of profits and gains. Why, therefore, should the payment of the sum in question, which by an actuarial calculation represents the sum equal to the annual payments which would be necessary, not be considered as in the same position ? To use the words of Lush J. in *Hancock's* case (1), which was

(1) [1919] 1 K. B. 25, 37.

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the case of a lump sum paid in purchasing an annuity in lieu of an annual pension: "It is the pension in another form; it is actuarially equivalent in value and it is identical in character. It was paid to meet a continuing demand which was itself an ordinary business expense." Or as expressed by the Master of the Rolls in *Rowntree's* case (1): "Then," he says, "we come to another class of cases, in which an expenditure is made on business grounds of a sum, apparently a capital sum, but which really comprises and compresses what is an annual charge." My Lords, I agree with their statements of principle, and in my opinion they are entirely applicable to the present case. Indeed a careful comparison of the reasoning on which the judgments are founded in these two cases greatly helps to determine on which side of the line such an expenditure should be placed. I can find no reason for holding that a payment made to make up the contribution to a sufficient sum to enable the older servants of the company to enjoy the benefits of the pension fund brings into existence an asset or an advantage for the enduring benefit of trade and might therefore be attributed not to revenue but to capital. I notice that my noble friend on the Woolsack agrees with the decision in *Hancock's* case (2) as I also do, but I fail, as Rowlatt J. failed, to see how it can in principle be distinguished from the present case. I am of opinion that this appeal should be allowed.

LORD BLANESBURGH. My Lords, it is, I apprehend, now well settled that in the Income Tax Acts, unless the context requires a different meaning to be placed upon them, such words as "profits," "gains," "capital," are to be construed according to their ordinary signification in commerce or accountancy. It will accordingly not be amiss if, remembering the nature of the present controversy, an attempt be made to ascertain from the statements or accepted implications of the stated case, but, in the first instance, merely as a business proposition, what was the precise nature and purpose of the payment now in question and,

(1) [1925] 1 K. B. 328, 336. (2) [1919] 1 K. B. 25, 37.

as consequent thereon, its proper place in this company's accounts.

Up to 1916 the clerical and technical staff of the company had no superannuation fund existent for their benefit. The lack of one had in practice proved disadvantageous to the company in several ways. With no continued provision in prospect for their old age, experienced members of its staff had been prone to leave the service for appointments elsewhere more attractive in this regard; and the natural anxiety of those who remained as to their financial position after retirement was not without its effect both upon their contentment and their efficiency. The existence of a pensions fund built up by their own contributions would assist, and if these contributions were supplemented by additions to be made to them by the company, would, it was expected, succeed in remedying this state of things. The fund would constitute a strong inducement to the individual contributories to remain during their working lives in the company's service, and it would tend to their increased efficiency while they so remained.

It was no part of the Attorney-General's case that this was not a reasonable expectation. That the company's action in this matter was prompted by anything more altruistic than an enlightened self-interest well calculated to secure for its business as a profit-earning concern and for itself as a good employer the advantages already indicated, the Attorney-General was not concerned to dispute.

Now, expenditure by a trading company of which so much can be affirmed is well within its powers, whether expressly so conferred or not. This is no longer doubtful. Indeed, since the case of *Hutton* v. *West Cork Ry. Co.* (1), in which both the rationale of the power and its limitations are clearly expounded, this matter has ceased to be debatable. Modern conditions of industry have only tended to make the occasions for its exercise more frequent and more compelling. For myself, I cannot escape the conviction that, if the action of the company in this matter had been seen to be, as in my judgment it clearly is, no more than a striking illustration of the

(1) 23 Ch. D. 654.

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legitimate exercise of its inherent powers as in that judgment described, this case would have been shorn of much of the difficulty which it has presented to those who have regarded it from another angle.

In 1916 the pension which by means of the fund then in contemplation was to be provided for each participant on retirement at sixty-five was one-sixtieth of his average salary for every year of his service with the company. And there were to be other benefits. It was believed that if the contributions required of them were not made prohibitive, 300 at least of the company's then salaried staff would join a fund offering such advantages. It was, of course, of the essence of the scheme that in adequate numbers they should. Practical abstention on their part would have destroyed the whole raison d'être of the fund so far as the company's participation in it was concerned. The necessity of securing their adhesion to it from the company's point of view explains the specially attractive terms which were offered them. In the case, for instance, of future members of the staff who were to be required to join the fund as part of their contracts of service, only those under forty at the date of joining were under deduction from their salaries of so little as 5 per cent. to be entitled to the benefits of the fund. Not so the existing members of the staff. They were at that maximum cost to themselves and irrespective of age to be admitted as full participants ; and, not only so, but their service with the company prior to the establishment of the fund and when, of course, no payments towards it were being made by them were to rank as pension years of service. Now, happily as many will think, the time has gone by when terms like these are, in such a connection, to be viewed even by a tax gatherer with jaundiced eyes. Here, however, it is not even suggested that they were more attractive than the occasion required. They could not, however, without a contribution to the fund made specially on account of these employees have been fulfilled. A fund composed alone of the proposed future contributions and offering these benefits would from its very inception have been actuarially insolvent. The contribution of 31,784*l.*, with which your Lordships are now

concerned, was the payment actuarially calculated to be requisite, and it was in the event by the company made, to avoid that result.

On August 8, 1916, the company executed the trust deed constituting the fund, and it thereby covenanted with the trustees to make the following payments :—

(*a*) The sum now in question ;

(*b*) An annual contribution aggregating one-half of every sum in the same year contributed by each participant employee ;

(*c*) A contribution sufficient to make the annual return upon the invested moneys of the fund one of 4 per cent.

This third contribution does not enter into the argument and need not again be referred to. With reference to the other two, however, it is well nigh vital to ascertain what they really represented and what under the trust deed was the duty of the trustees in relation to them when received.

The sum with which your Lordships are immediately concerned, this 31,784*l.*, represented the actual equivalent of the sum with accretions of interest which would at the date of the establishment of the fund have been in the hands of its trustees if there had in fact been made by or on account of each of these participant members during each of the previous years of service for which he was to rank for pension the payments which would have been called for had the fund then existed. It was a payment by the company on account of each of these employees of a sum which in the language of the Master of the Rolls in *Rowntree's* case (1) comprised and compressed a series of prior annual payments on his account. It was a sum, and this is perhaps in the present connection its most important characteristic, actuarially so adjusted in amount that when the last of the existing staff, participant to the fund, on whose account it had been paid died or fell out of benefit no part of it or of any accretion to it would remain in the hands of the trustees. It would then have been entirely exhausted in providing the covenanted benefits for the participants on whose account it was paid. It is as if the company, as it

(1) [1925] 1 K. B. 328, 336.

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might well have done, had paid this money to the trustees of a pension fund, otherwise identical in its provisions and benefits with that constituted, but in which only then existing members of the staff were to be participant. On the death of the last of these the trustees actuarially would be left with no funds at all. In no sense was this 31,784*l.* the permanent capital of any fund.

As to the annual contributions made, as these were to be, on account of every participant member of the fund, present and future, what is important to note about them is that it was the duty of the trustees, as with the first sum, to invest and accumulate them when received so far as they were not required to meet current outgoings of the fund. In other words, there was to be no distinction at all between the way in which the trustees were to deal with payment (*a*) and with payments (*b*) when made and received. All contributions received by them became, on receipt, indistinguishably blended.

My Lords, if what I have so far said be accurate, it follows that in no relevant respect do these payments (*a*) and (*b*) differ from one another. What, then, is the outstanding characteristic of all of them ? It is, I think, this, that they are made by the company for the account, as to the first payment, of some, as to the later payments, of all of its participant staff employees ; made, it is true, in a special form to secure a special end, but, from the company's side, when regard is had to their purpose, made with the same justification that would attend the payment of an increased remuneration of the individual employees benefited. Regard, in retrospect, after his retirement, the proportion of these payments made by the company on account of any individual participant. In no material respect, quoad the company, do they differ from any payments of salary made to him direct. In truth, we have here a much plainer case than that of *Hancock*. (1) There the payment was made in respect of an officer who had retired. The main justification suggested for it was the protection of the company against recurrent demands. Here the payments are made on account of officials

(1) [1919] 1 K. B. 25.

still in the service, and are made that that service may be more contented, more efficient and more prolonged. Can any higher warrant than this for the payment of any staff salary be suggested ?

And it is admitted by the Crown that the company's periodical contributions (*b*) are all of them properly chargeable to revenue account. But why so ? Surely, because they are not only, as I have, I hope, shown, legitimate payments, but because, as such, they are none other than expenses prudently incurred in the course of the company's business. And such, too, is payment (*a*)—this sum of 31,784*l*. Payments (*b*) are additional remuneration for every one of the participant members of the fund, proportioned in each case to his own contribution to it. Payment (*a*) is still further remuneration in no way commercially excessive for those of them who when the fund was established were already in the company's service, and proportioned in each case to the amount of his salary for the time being.

I do not myself see how any of these payments could properly be charged to capital account by any company which keeps its accounts on the double account system. And as the Income Tax Acts contemplate that accounts will be so kept, no other system need here be considered. Under that system, as is well known, the two accounts, capital and revenue, or trading account, as in business language it is usually termed, are separate accounts. The capital account is concerned with the company's fixed capital and its application. The revenue account is concerned with the company's trading or circulating capital and its application. Dividends may lawfully be paid, although, it may be, the whole of the company's fixed capital has disappeared. No profits available for dividend are, however, existent, unless the company's trading capital would remain intact after they had been distributed as such. If what I have so far said be correct, it follows that for this company to have charged any of these payments, either (*a*) or (*b*), to capital account would have thrown on that account a revenue charge ; would have enabled the company to ascertain profits and distribute dividends without taking it into account ;

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would have introduced a system facilitating in the case of a company less prosperous the concealment, more or less successful, of the truth, that dividends declared during a period of depression were in whole or in part being paid out of capital.

My Lords, on the facts of this case there were, as it seems to me, only three funds from which any of these payments (*a*) or (*b*) could, by such a company as this, legitimately have been taken. The first was its undistributed profits—the payments, if thence derived, being no more than a series of bonuses to its employees out of the realized profits of good years. The second was its gross receipts before profits were struck. The third, merely another aspect of the second, and not applicable to this prosperous company, was working capital to which recourse might properly be had on any occasion when the gross receipts after these payments had been charged against them were less than the outgoings by at least an equivalent amount.

Applied to this company, on the facts found, there is, as to the first of these no suggestion of any intention on its part to make these payments out of realized profits. The unqualified covenant into which it entered with regard to them would have effectively disposed of such a suggestion had it been made.

As to the third the gross receipts, as I have indicated, were more than adequate to meet the payment and still leave a large surplus.

The revenue account, therefore, strictly so called, alone remains as the place in which they can properly appear.

As to the suggestion that the 31,784*l.* representing the notional payments made over a number of years must be treated as capital because that sum was paid in one year and in one amount, I find myself in entire agreement with Lush J., when in *Hancock* v. *General Reversionary and Investment Co.* (1) he said: "It seems to me as impossible to hold that the fact that a lump sum was paid instead of a recurring series of annual payments alters the character of the expenditure

(1) [1919] 1 K. B. 25, 37.

as it would be to hold that, if an employer made a voluntary arrangement with his servant to pay the servant a year's salary in advance instead of paying each year's salary as it fell due, he would be making a capital outlay."

For these reasons, I cannot bring myself to doubt that this payment of 31,784*l.*, judged of purely as a commercial transaction of this company and not purporting or intended to be a bonus out of profits, could only properly be brought into charge, as in fact it was, in the revenue account of the company.

And if this be the true conclusion, apart from the Income Tax Acts, the propriety of this payment as an admissible deduction in the ascertainment of the balance of the company's profits and gains under these Acts follows, I think, almost as of course.

My Lords, I will substitute for any re-statement of the relevant provisions of the statutes, already well under your Lordships' notice, two authoritative pronouncements as to their effect.

"Profits and gains," said Lord Loreburn, in the case of *Usher* (1), "must be estimated on ordinary principles of commercial trading by setting against the income earned the cost of earning it, subject to the limitations prescribed by the Act."

"The effect . . . . I think, is this," said Lord Sumner in the same case, "that the direction to compute the full amount of the balance of the profits must be read as subject to certain allowances and to certain prohibitions of deductions, but that a deduction, if there be such, which is neither within the terms of the prohibition nor such that the expressed allowance must be taken as the exclusive definition of its area, is to be made or not to be made according as it is or is not, on the facts of the case, a proper debit item to be charged against incomings of the trade when computing the balance of profits of it."

To these I will add three further statements as to the true result of the Act in matters relevant to the present discussion.

(1) [1915] A. C. 433, 444, 468.

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The first, justified by reference both to *Usher's* case (1) and to the judgment of Lord Dunedin, when Lord President, in the *Vallambrosa* case (2), is that the fact that expenditure in question is not referable to the profits of the year in which it is made does not prevent it from being a proper deduction in that year. The second, justified also by *Usher's* case (1), is that the admissibility of a deduction under the Act is not dependent upon the question whether at the time the payment was made the subject was under legal liability to make it. Payments, justifiable on the principle of *Hutton's* case (3) already cited, are well within the limits of admissibility. The third, justified by some observations in the judgment of Scrutton L.J. (4) in the present case which command my entire concurrence, is that the reference in r. 3 of Case I. in s. 100 of the Act of 1842 to "capital" withdrawn from or employed in the trade is a reference to fixed capital, as distinct from "circulating" or, in Lord Watson's phrase, "trading" capital, the proper source for payment of wages and other expenses incurred in the conduct of a trader's business: see *Gresham Life Assurance Society* v. *Styles*. (5)

Bearing these authoritative considerations in mind, I proceed now to apply the relevant prohibitions of the Acts to this payment, and I ask myself first whether there is any ground for affirming that this money was not laid out or expended wholly and exclusively for the purposes of this company's trade, manufacture, adventure or concern? The answer must, I think, be in the negative. The explanation already given of the circumstances in which, and the object for the attainment of which, the payment was made leaves no doubt in my mind on this point, and I believe all your Lordships take the same view. I notice that the Master of the Rolls, for the purpose of his judgment only, and clearly with some reluctance, accepts it. I am myself unable to share his reserve.

I next ask myself whether it is true to say that this payment

(1) [1915] A. C. 433.
(2) 5 Tax Cas. 529.
(3) 23 Ch. D. 654.
(4) [1925] 1 K. B. 440.
(5) [1892] A. C. 309, 318.

represented " capital withdrawn from or any sum employed or intended to be employed as capital " in the company's trade ? Again, I think the answer must be in the negative. Mr. Hills, in his able argument on behalf of the Crown, while disclaiming any desire to attach too much weight to the contention, found in cl. 3 (A) of the trust deed of the fund, by which the company covenanted to pay this sum to the trustees " in order to provide the capital sum necessary in order that past years of service of the present permanent staff since they received a salary of 100*l.* per annum or more shall rank for pension," an indication that this was on the part also of the company a payment on capital account. The suggestion strikes me as novel. I cannot myself see how that which really is a revenue payment on the part of the trader making it—whether it is so or not is of course a question—can become a capital disbursement merely because the recipient invests it or, if you like, agrees to invest it, any more than I can see how that which was a capital payment on the part of the payer becomes a revenue payment merely because the recipient spends it or is left at liberty to spend it. Moreover, the application of this principle to the present case would, in view of the terms of this trust deed, equally extend to the company's periodic payments all of which the Crown agrees and even asserts are properly chargeable to revenue.

And the difficulty of treating this as a capital disbursement of the company is appreciated when the divergent grounds on which the Master of the Rolls and Scrutton L.J. held it so to be are regarded. In the view of the Master of the Rolls this payment not being " a necessary expenditure in seeking profits and gains," was only made at all because the company had a good year ; if they had had a bad year they would not have made it, " still less would they have charged it on ordinary principles to the revenue account " . . . . " therefore . . . . it ought to be treated as being an item of capital to be employed as capital in such trade." My Lords, I demur in limine to the statement that a disbursement to be admissible as a deduction must be a " necessary " expenditure in seeking profits. *Usher's* case (1) I think clearly indicates that it

(1) [1915] A. C. 433.

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suffices, in this regard, if it be prudent in the proper and reasonable conduct of the trade. One has only to recall in this connection advertising expenditure. But, my Lords, even if the premises be conceded I cannot myself see that the conclusion follows. The learned Master of the Rolls might, possibly, consistently with his premises have well held that this payment was in truth a bonus out of realized profits and not an expense incurred with a view of maintaining them in the future. That, however, was not open to him on the case stated. That these premises lead to the conclusion that the payment is one either withdrawn from or to be employed as capital—as fixed capital bien entendu—seems to me to be quite inadmissible.

Scrutton L.J., to whose views as to the meaning of the word "capital" in the statute I have already referred, holds that the sum should be disallowed, because as a result of the expenditure "either capital was withdrawn from the business for this pension fund or the capital employed in the business created an asset or advantage of the business"—by which expression, as the Lord Justice explains in another part of his judgment, he means "something in the nature of fixed capital." Now, my Lords, this method of arriving at the same result as the Master of the Rolls is, in my judgment, equally open to destructive criticism. In no sense of the word "capital," circulating, working or fixed, did this expenditure involve any withdrawal. It was made out of gross receipts in a year in which, working capital and, a fortiori, fixed capital, remaining intact, a large surplus still emerged. Nor, in my judgment, did the expenditure in any relevant sense create a new asset of the company of the nature of a fixed capital asset or any other. The learned Lord Justice does not more closely describe this so-called asset or, fixed though it was, did he attach to it a name by which it could be recognized. He did not suggest that it resulted in an enhanced goodwill. He could not, in my judgment, have done so with reason, because it has never, I think, even been suggested that a contented personnel is an element in goodwill, whatever else it may be. In that state of things it has occurred to me, my Lords, that the existence

or non-existence of this so-called asset might fairly be submitted to the prosaic test of asking what in a liquidation would be forthcoming in respect of it when a liquidator essayed his statutory duty to realize the company's assets and divide the proceeds amongst his constituents. Certainly no part of the fund. That in its entirety is completely alienated. And I can myself think of nothing else. Moreover, my Lords, a reference to the authorities shows, it seems to me, clearly that it is by reference to no such shadowy conceptions that the words of the statute "employed as capital" have to be interpreted. Such things as a purchase of goodwill involving a capital expenditure might come within them: *Smith & Son* v. *Moore* (1), an excess profits duty case. The expense of making a new channel to the sea essential or convenient for approach to a shipyard would be such expenditure, notwithstanding that the channel when constructed would not be the property of the trader and that others jointly with himself would have the right to use it on their lawful occasions: *Ounsworth* v. *Vickers, Ld.* (2) The expenses incurred in the promotion of a private Bill the capital object of which was ultimately obtained by agreement: *Moore & Co.* v. *Hare.* (3) These advantages are real and definite. I can see nothing comparable here. Moreover, in this connection also the observation already made is true that the principle expounded by the Lord Justice would equally apply to the annual payments to be made by the company, and admittedly properly chargeable to revenue.

The result, therefore, is that, in my judgment, there is so far no prohibition in the statute which prevents, for the purposes of income tax, the application to this disbursement of the principles which for any other purpose are alone, as I think, properly applicable to it. And no other statutory prohibition is suggested.

Warrington L.J.'s ground of decision against the appellants is quite different. He would, I think, as I have done, have answered in the negative the two questions already propounded. It is, at any rate, consistent with his judgment that he would

(1) [1921] 2 A. C. 13. (2) [1915] 3 K. B. 267, 276.
(3) 6 Tax Cas. 572.

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have done so. His decision for the Crown is based solely on the ground that in his judgment the payment in question was, in Lord Sumner's words already quoted, "not a proper debit item to be charged against incomings of the trade when computing the balance of profits of it." The learned Lord Justice treats these words of Lord Sumner's as extending to a *revenue* disbursement wholly and exclusively laid out or expended for the purposes of the trade, which is, nevertheless, still inadmissible as a deduction because it is not a proper debit item to be charged. I agree with the Lord Justice in thinking that the words do import all that. But what amount of impropriety is to be treated as sufficient to require disallowance as improper of a disbursement which is not the subject of, at all events, express statutory prohibition? It must surely be an expenditure somewhat abnormal or irrational or extravagant. I conceive, for instance, that a payment avowedly made out of realized profits such as is alluded to by Lord Dunedin in another portion of his judgment in the *Vallambrosa* case (1) would clearly be within the words. I doubt, however, whether the learned Lord Justice would have brought the present disbursement within the same category had there been present to his mind the extraordinarily compelling circumstances which, as a matter of business, had led to it. These properly regarded—I do not again detail them—and the payment treated—on this hypothesis it must be—as a revenue payment, it seems to me impossible to hold that it was in any sense at all either excessive or improper.

My Lords, I need not expand a judgment already too long by any further discussion of the authorities. I think with the Lord Chancellor that *Hancock* (2) was correctly decided, but I should myself have been prepared to decide this case as I do even if I were of opinion that *Hancock* (2) could not be supported—so much more compelling in a relevant respect are the facts and circumstances here. As to *Rowntree* (3) the disbursement there sought to be justified came, in my judgment, both within the express prohibition

(1) 5 Tax Cas. 529. (2) [1919] 1 K. B. 25.
(3) [1925] 1 K. B. 328.

of the statute and its implied prohibition as enunciated by Lord Sumner.

On the whole case I am of opinion that the order of the Court of Appeal should be reversed and that of Rowlatt J. restored.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, Dec. 11, 1925.

Solicitors for the appellants : *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitor for the respondent : *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

PARR AND OTHERS . . . . . APPELLANTS ;

AND

ATTORNEY-GENERAL . . . . . RESPONDENT.

H. L. (E.)* 1925 *Dec.* 18.

Revenue—Estate Duty—Aggregation of Estates—Tenant for Life under Will—Disentailing Deed and Resettlement—Life Estate in Restoration and by way of Confirmation of Life Estate under Will—Property passing on Death of Tenant for Life—Aggregation of free and settled Property—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 4—*Finance Act*, 1900 (63 *Vict. c.* 7), *s.* 12, *sub-s.* 2—*Finance Act*, 1907 (7 *Edw.* 7, *c.* 13), *s.* 16.

Under the will of a testator, who died in 1870, real estate was devised to the use of A. for life, and after his death to the use of his sons successively in tail male. On November 4, 1895, A. and his son B., then tenant in tail, concurred in executing a disentailing assurance conveying the property to a grantee to hold to such uses as A. and B. should jointly appoint. By a resettlement dated December 19, 1895, the property was appointed and conveyed to such uses and upon such trusts and subject to such powers as A. and B. should jointly appoint, and in default of such appointment to the use of A. for life by way of restoration and confirmation of his life estate under the testator's will, and subject thereto to the use of B. for life with remainder to the use of his sons successively in tail male. A. died in 1920 possessed in his own right of real and personal estate. The Crown claimed that on A.'s death his own estate and the settled property fell to be aggregated under s. 4 of the Finance Act, 1894, so as to form one estate for the purposes

* *Present :* VISCOUNT HALDANE, LORD ATKINSON, LORD BUCKMASTER, LORD CARSON, and LORD BLANESBURGH.

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of estate duty. The defendants contended that the settled property passed on the death of A., not under the resettlement, but under the will of the testator, who died before August 1, 1894, and that by virtue of s. 12, sub-s. 2, of the Finance Act, 1900, and s. 16 of the Finance Act, 1907, the settled property did not fall to be aggregated with A.'s own estate, but was liable to estate duty as an estate by itself:—

Held: (1.) (by Viscount Haldane, Lord Buckmaster, and Lord Blanesburgh; Lord Atkinson dissenting and Lord Carson not assenting), overruling *In re Constable's Settled Estates* [1919] 1 Ch. 178, that the life estate devised to the use of A. for life by the will of the testator was not disturbed by the resettlement; but

(2.) (Viscount Haldane dissenting) that the settled estate passed on the death of A. under the resettlement, and that therefore A.'s free estate and the settled estate of which he was tenant for life fell to be aggregated.

Decision of the Court of Appeal [1924] 1 K. B. 916 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Rowlatt J. (2) The appeal related to the estate duty which became payable on the death of the late Joseph Charlton Parr on February 27, 1920, in respect of the free estate of which he died possessed and certain settled estate of which he was tenant for life in possession at the time of his death, and it raised the question whether for the purpose of determining the rate of estate duty payable on his death the values of the free and settled estates should be aggregated so as to form one estate pursuant to s. 4 of the Finance Act, 1894, or whether the settled estate was exempted from aggregation by the joint effect of s. 12, sub-s. 2, of the Finance Act, 1900, and s. 16 of the Finance Act, 1907, and ought to be treated as an estate by itself. This question depended upon the question whether the settled property passed under a disposition consisting of the will of the late Thomas Parr (hereinafter called the testator), who died in 1870, or under a disposition consisting of a resettlement dated December 19, 1895, and made by the late Joseph Charlton Parr and his son, the appellant, Roger Charlton Parr.

The facts are fully stated in the report of the case before the Court of Appeal and sufficiently appear from the opinion of Viscount Haldane.

The appellants were the present tenant for life of the settled

(1) [1924] 1 K. B. 916. (2) [1923] 2 K. B. 456.

estate, the trustees of the resettlement, and the executors of the late tenant for life, Joseph Charlton Parr. The appellants having declined to pay estate duty except on the basis that the settled property ought to be treated as an estate by itself, the Attorney-General filed an information against them. Rowlatt J. held on the authority of *In re Constable's Settled Estates* (1) that the limitations of the resettlement had completely replaced those of the testator's will, and that for the purpose of determining the rate of estate duty the settled and free property ought to be aggregated; and the Court of Appeal, by a majority (Pollock M.R. and Atkin L.J.; Sargant L.J. dissenting), affirmed his decision.

This appeal was originally argued before Viscount Cave L.C., Lord Dunedin, Lord Wrenbury, Lord Phillimore and Lord Carson, but was subsequently set down for re-argument.

1925. Oct. 29, 30; Nov. 2, 3. *Maugham K.C.* and *Stamp* for the appellants. The question under what disposition the property passed depends upon the question whether at the time of his death, when the property passed, Joseph Charlton Parr was seised of the life estate originally devised to him by the testator under the will or under the resettlement of December 19, 1895. The intention of the parties to the resettlement was that the life estate should be left unimpaired except for the interposition of the rentcharge created by the resettlement. If the tenant for life had joined in the resettlement merely for the purpose of charging his life estate no question could have arisen, and the limitation in the resettlement to the use of the deceased for his life by way of restoration and confirmation of his then present life estate under the will has no other effect. The restoration and confirmation clause is absolutely effective to confirm the life estate which the deceased originally had. Some light is thrown upon this matter by three decisions of this House upon succession duty: *Lord Braybrooke* v. *Attorney-General* (2); *Attorney-General* v. *Floyer* (3); *Attorney-General* v.

(1) [1919] 1 Ch. 178. (2) (1861) 9 H. L. C. 150.
(3) (1862) 9 H. L. C. 477.

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Smythe. (1) Those cases show, in circumstances very similar to the facts of this case, that the substance and not the form is to be looked at in determining who was the predecessor for the purposes of the Succession Duty Act. The resettlement is clearly a disposition, but it is not the disposition under which the property effectively passed. The question is under what disposition is there a cesser of interest, and the answer is the will of the testator. In *In re Constable's Settled Estates* (2) Swinfen Eady M.R., giving the judgment of the Court of Appeal, decided, reversing the decision of Sargant J., that where there was a resettlement with a restoration and confirmation clause the tenant for life did not get back the same estate, and the majority of the Court of Appeal have considered that that decision covers the present case. The Legislature have adopted the view that that decision is not and never was the law: Settled Land Act, 1925, s. 22, sub-ss. 1, 2. But this Act does not come into force until January 1, 1926. The decision of the Court of Appeal was a decision under the Settled Land Act, 1882, and was not concerned with estate duty, but it proceeds upon a misconception of *Alexander* v. *Mills* (3), and it involves the overruling of several cases and a passage in Sugden on Powers. In three cases—namely, *In re Wright's Trustees and Marshall* (4); *In re Cornwallis-West and Munro's Contract* (5); *In re Du Cane and Nettlefold's Contract* (6)—it was held that the original life estate was left unimpaired by the resettlement where the limitation was by way of restoration and confirmation of the existing life estate. These decisions are in accordance with the view expressed by Lord St. Leonards in his book on Powers, 8th ed., pp. 71 et seq. and p. 895, and in *Harrison* v. *Round* (7), and by Mr. Charles Butler in his tenth edition of Fearne on Contingent Remainders, vol. i., p. 380n. The doubt suggested in Davidson on Conveyancing, 3rd ed., vol. iii., p. 596, is not warranted by

(1) (1862) 9 H. L. C. 497.
(2) [1919] 1 Ch. 178.
(3) (1870) L. R. 6 Ch. 124.
(4) (1884) 28 Ch. D. 93.
(5) [1903] 2 Ch. 150.
(6) [1898] 2 Ch. 96.
(7) (1852) 2 D. M. & G. 190.

anything in s. 3 of the Law of Inheritance Act, 1833, on which reliance was placed.

[They also referred to *In re Mundy and Roper's Contract* (1); *In re Lord Wimborne and Browne's Contract* (2); *In re Spearman Settled Estates* (3); *In re Meeking* (4); Gilbert on Uses, 3rd ed., p. 121.]

Sir Thomas Inskip S.-G. and *Clauson K.C.* (with them *Beebee*) for the respondent. 1. Apart from *In re Constable's Settled Estates* (5), for the purposes of the Finance Acts the settled property passed under the resettlement of 1895. 2. *In re Constable's Settled Estates* (5) is right and governs this case. As to 1. In order to see how the settled property is dealt with you must look at the resettlement, and that gives you a complete guide. The word "disposition" in the Finance Acts involves that you must consider not merely the interest which comes to an end but the interest which begins. As to 2. Even if Joseph's interest alone is regarded he takes back his life estate under the resettlement. The limitation can only be created under the joint power of appointment, and if the power of appointment is exercised a new estate is created which ipso facto destroys the estate existing in default of appointment notwithstanding that the new estate is precisely similar to the pre-existing estate. By refusing to touch the life estate and using different machinery the result which the appellants contend for could have been effected, but the exercise of the power of appointment produces a different result, and a new but corresponding estate is created.

[They referred to *Earl Cowley* v. *Inland Revenue Commissioners* (6); Farwell on Powers, 3rd ed., p. 310, para. 56; Davidson on Conveyancing, 3rd ed., vol. iii., pt. ii., p. 1293n.; *Sweetapple* v. *Horlock* (7); *Attorney-General* v. *Earl of Selborne*. (8)]

Stamp replied.

The House took time for consideration.

(1) [1899] 1 Ch. 275, 294.
(2) [1904] 1 Ch. 537.
(3) [1906] 2 Ch. 502.
(4) [1922] 2 Ch. 523, 533.
(5) [1919] 1 Ch. 178.
(6) [1899] A. C. 198.
(7) (1879) 11 Ch. D. 745.
(8) [1902] 1 K. B. 388.

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1925. Dec. 18. VISCOUNT HALDANE. My Lords, in this case I think that there may turn out to be considerable divergence in our judicial opinion as to the merits of the appeal. The question is a difficult one of law, and I propose to state it as briefly as the necessity for accuracy permits.

The controversy between the parties is whether, as the appellants contend, certain settled property which, on the death in 1920 of Joseph Charlton Parr, admittedly passed within the meaning of the Finance Act, 1894, is, for the purpose of determining the rate of estate duty to be paid on that death, exempted from the rule as to aggregation prescribed by s. 4 of Part I. of that Act, and ought to be treated as an estate by itself, in virtue of the combined operation of s. 12, sub-s. 2, of the Finance Act, 1900, and s. 16 of the Finance Act, 1907, and to be liable to pay only estate duty so limited, without being aggregated with the remaining property which passed on the death of Joseph Charlton Parr.

Under s. 1 of the Finance Act, 1894, estate duty is to be leviable upon the principal value, to be ascertained as thereinafter provided, of all property, real or personal, settled or not settled, which passes on the death of a person dying after the Act comes into operation. By s. 2 property passing on the death of the deceased is to be deemed to include (inter alia) property of which the deceased was at the time of his death competent to dispose, and property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by reason of the cesser of such interest. By s. 4 all property passing is to be aggregated so as to form one estate for the purpose of levying duty, subject to the proviso (by way of exception) that (inter alia) any property so passing which, under a disposition not made by the deceased, passes immediately on the death of the deceased to some person other than the wife or husband or a lineal ancestor or lineal descendant of the deceased, shall not be aggregated. The scope of the exception was further extended by the Finance Act, 1900. Under s. 12, sub-s. 2, of that Act: "Where

settled property passes, or is deemed to pass, on the death of a person dying after the passing of this Act under a disposition made by a person dying before the commencement of Part I. of the Finance Act, 1894" (both of which conditions, so far as dates were concerned, were satisfied in the case before us), "and such property would, if the disponer had died after the commencement of the said part, have been liable to estate duty upon his death, the aggregation of such property, with other property passing upon the first-mentioned death, shall not operate to enhance the rate of duty payable either upon the settled property or upon any other property so passing by more than one half per cent. in excess of the rate at which duty would have been payable if such settled property had been treated as an estate by itself." By a subsequent statute, the Finance Act, 1907, this exemption was extended in scope, and it was provided that in the case of persons dying after April 19, 1907 (which was the case with Joseph Charlton Parr), any settled property which would under the Act of 1900 be aggregated with other property so as to enhance the rate of duty to the limited extent provided in that section, should, for the purposes of the Act of 1894, instead of being so aggregated, be treated as an estate by itself.

My Lords, I now turn to the dispositions by which the title to the property sought to be taxed is governed, in order to ascertain how the statutory provisions which I have quoted bear on them.

Thomas Parr, by his will dated in 1869, devised certain portions of his real estate to the use of Joseph Charlton Parr for life and, after the death of the latter, to the use of the first and every other son of Joseph successively in tail male with remainders over. He empowered Joseph by deed or will to appoint to any woman he might marry a yearly rent-charge for her life not exceeding 600*l.*, charged upon and payable out of parts of the real estate, and also to charge these with portions for his children other than the first or only son entitled under the will. There were other devises under the will which need not be referred to. Thomas Parr died in 1870.

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By a disentailing deed executed in 1895, by Joseph Charlton Parr, then tenant for life, and his eldest son Roger Charlton Parr, who had then attained twenty-one, the real estate subject to the settlement made by the will was conveyed to a trustee, subject to the existing jointure rentcharge and portions and the powers and terms for securing or raising them, to such uses and trusts as the tenant for life and tenant in tail should jointly appoint, and in default of and subject to such apportionment to the uses and upon the trusts and with and subject to the powers and provisions which were subsisting or capable of taking effect with reference to the premises, and so as to restore and confirm the same uses, trusts, powers and provisions respectively. Under the deed there can be no doubt that Joseph and Roger remained entitled as tenant for life and tenant in tail to legal estates.

By a deed of resettlement made shortly afterwards, Joseph and Roger Charlton Parr conveyed the premises to trustees to such uses and upon such trusts and subject to such powers and provisions as Joseph and Roger should jointly appoint, and subject thereto to the use that Roger should receive certain rentcharges during their joint lives, and so that if he left a widow she should receive a rentcharge not exceeding 2000*l.* a year, as he should by deed or will appoint, and subject thereto to the use of Joseph for his life without impeachment of waste "and by way of restoration and confirmation" as regards the premises appointed "of his present life estate therein" under the will of Thomas Parr, together with all the existing powers of Joseph under the will of jointuring a wife and charging portions for younger children and the other powers capable, before the disentailing deed, of taking effect during his life under the will or the Settled Land Acts or otherwise, with remainder to the use that one Jessie Maria Parr should, if she survived Joseph, receive a certain rentcharge during her life, and subject to this to such uses as Roger should by deed or will appoint under certain restrictions, and subject thereto to the use of Roger for his life without impeachment of waste with various remainders over to the use of the first and other sons of Roger successively in tail

male. It was also provided that all moneys and investments comprised in the disentailing assurance should be held on the trusts on which the same would be held were they capital moneys arising under the Settled Land Acts and should be primarily liable to be invested in freehold hereditaments so as to be impressed with the quality of and devolve as real estate.

My Lords, I entertain no doubt that the remainders limited by the deed of resettlement after the life estate restored and confirmed to Joseph Charlton Parr were new estates created by the resettlement itself. But that is not the question which we have to consider. The real question is whether the life estate of Joseph himself was a new estate, or whether it was an old one which derived its existence solely from the original will, and came to an end, and so passed as created on his death in 1920 under the disposition made by the will of 1869 itself within the meaning of s. 12 of the Finance Act, 1900.

What is the meaning in the Finance Acts of "passing on death"? I think this House in *Earl Cowley* v. *Inland Revenue Commissioners* (1) determined that such a case as the present one comes within s. 1 of the Finance Act, 1894, as relating to settled property even where, in the words of Lord Macnaghten, "a limited interest under a settlement ceases on death and passes to no one." That is "passing" within the meaning of the first section so as to be the subject of the duty. The existence of a subsequent remainder appears to be unnecessary for the constitution of such a passing, however important it may be for the question who is to bear the burden of the tax under subsequent sections of the statute. For it is on a mere passing on death that the duty is levied. In this respect the duty imposed in accordance with s. 1 is analogous to probate duty. Nothing in the subsequent sections of the Act which are concerned with the amount of the duty to be paid and the persons who are liable to make the payment alters, in my opinion, the scope or meaning of the words in s. 1. I have therefore come to the conclusion

(1) [1899] A. C. 198, 212.

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that the duty in this case in truth attached on the mere cesser of the life estate of Joseph, and not on the arising of the new interests which came into being on his death, either under the will or the resettlement.

But this does not dispose of the question we have to decide. What was the character of the life estate which ceased? Was it created by the resettlement or was it in contemplation of law created by the will of Thomas Parr, who died before the Act of 1894 within the meaning of s. 12, sub-s. 2, of the Act of 1900? No doubt other estates in remainder took effect after that cesser under the resettlement, but they only took effect because the life estate had determined. They did not on Joseph's death bring themselves into operation. Nor were they ever created on Joseph's death. They arose under a conveyance, the resettlement, which brought them into existence de presenti, immediately on its execution. It is true that the resettlement contains a limitation of the premises to Joseph for life "by way of restoration and confirmation" of his present life estate under the will. But did such words operate to create a fresh estate or to turn the old estate under the will into a new life estate under the settlement? It seems to me that they should be taken to have been inserted merely to preserve any powers attaching to the old estate. I can see no other necessity for them. The limitations operated by way of use, and if they did it was because the Statute of Uses simply turned a trust into a use. Ought we to hold that a fresh trust was introduced so as to make a foundation for an application de novo of that statute? I do not think so. It seems to me that the question was one of the intention to be collected, and that the very words of restoration and confirmation, relied on by the Crown for an affirmative answer, in reality point to a negative one. The question whether a new trust was created is merely one of intention as to what was meant to be done, and when the language used indicates an intention not to create a new trust but to restore and confirm an old one, I think that that intention must be construed, not as though what was expressed were words of conveyance used in a deed of conveyance, but

as though it were a mere expression of an intention to preserve intact what was already there. Treating the matter as one of principle, I should therefore be of opinion that the life estate was the old one created by the use declared by the will and was not disturbed by the disentailing deed.

Now there is a considerable body of authority in support of the proposition that a resettlement such as we have before us does not disturb an old estate such as this one. In *In re Wright's Trustees and Marshall* (1) an estate had been devised to uses to secure certain annuities, and subject thereto in strict settlement, with power to trustees to sell at the request of the tenant for life under the devise in the will. The tenant for life and his eldest son, the tenant in tail, disentailed, subject to certain powers and charges, to such uses as the tenants for life and in tail should jointly appoint, and in default to the uses of the will. The joint power of appointment was exercised so as to make a mortgage on the fee, and subject to this and the existing powers, and to the grant of an annuity to the tenant in tail with a term to secure it to the use of the tenant for life for his life by way of continuance and confirmation of his former life estate under the will, with remainder over. The case came before Pearson J. He followed the opinion expressed by Lord St. Leonards, that the mere fact of a disentail and resettlement did not disturb shifting clauses, and left the old uses undisturbed. He held that when the intention was obvious not to destroy the old life estate, but only to give effect to limited arrangements which could be introduced without an intention to destroy it and to reconstitute it, the old life estate remained. In *In re Cornwallis-West and Munro's Contract* (2) Farwell J. followed this view of Pearson J. in an analogous case, treating the words of restoration occurring there as showing that it was intended to keep alive the old powers annexed to the life estate. In so holding he considered that he was following Stirling J. in *In re Du Cane and Nettlefold's Contract* (3), and was in accord with Chitty L.J. in *In re Mundy and Roper's*

(1) 28 Ch. D. 93. (2) [1903] 2 Ch. 150.
(3) [1898] 2 Ch. 96.

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Contract. (1) As to the view of Stirling J., I agree with him, and as to that of Chitty L.J., I think that Farwell J. was justified at least in thinking that the learned Lord Justice said nothing which was contradictory to what he himself was laying down. The questions on these two cases, however, related to a different subject matter, that of powers of sale under the Settled Land Acts, and it is only in dicta that they bear on the point before us. I may add here that I do not think that the decision of the Lords Justices in *Alexander* v. *Mills* (2), which was cited to us, is of particular relevancy to the present question.

My Lords, it appears to me for these reasons that the use purporting to be limited by the resettlement to Joseph Charlton Parr for his life by way of restoration and confirmation of his life estate under the will was not a new estate but was simply a preservation of the use arising under the will itself. I think that it was under the provisions of the will that this use was brought to an end with his death, so that there was a passing of property within the interpretation put on s. 1 of the Finance Act, 1894, in the *Cowley* case. (3) It follows that it was under the disposition made by the will of Thomas Parr, who died before the principal Finance Act came into operation, that the settled property passed, and that the case therefore falls within the exemption made by s. 12, sub-s. 2, of the Act of 1900.

The Court of Appeal have taken a different view. The learned judges there considered that the resettlement made such a change in the life estate that it became a new one, which passed under that deed. They considered themselves bound to follow, in so holding, a previous decision of the same Court: *In re Constable's Settled Estates.* (4) There the question was a different one, although the Court of Appeal in the present case rightly considered that the reasons given applied. By a will land was limited to uses for life with remainder in tail to the son of the tenant for life. Under powers given by the will the tenant for life had appointed a jointure to

(1) [1899] 1 Ch. 275.
(2) L. R. 6 Ch. 124.
(3) [1899] A. C. 198.
(4) [1919] 1 Ch. 178.

his wife and portions for his younger children. In 1912 the tenant for life and the tenant in tail disentailed by a deed in which the land was conveyed (subject to charges and incumbrances and to the life estate of the tenant for life) to such uses as he and the tenant in tail should appoint and in default to the uses and trusts and subject to the powers of the will, so as to restore and confirm the same. Shortly afterwards a deed of resettlement was executed by the tenant for life and the tenant in tail, by which the land was appointed and conveyed, subject to mortgages on the inheritance and jointure and portions, to such uses and subject to such powers and provisions as the tenant for life and the tenant in tail should jointly appoint, and in default of and subject to such appointment to the use of the tenant for life in restoration of the life estate or estates limited to him by the will and by another settlement which is not material, respectively, with remainders to the use of the tenant in tail for life with remainders over in tail male. The resettlement also declared that the trustees under the resettlement were to be trustees for the purposes of the Settled Land Acts, and that the person who should be tenant for life under the resettlement might exercise certain powers additional to those conferred by these Acts. The original tenant for life desired to exercise as tenant for life under the resettlement the powers conferred by the Settled Land Acts, and also the additional powers conferred by the resettlement. The question was whether he was tenant for life under the resettlement. The then Court of Appeal reversed the decision of Sargant J. that the tenant for life was such only under the original limitations of the will and therefore was not entitled to exercise powers under the resettlement. The judgment of the Court of Appeal was delivered by Swinfen Eady M.R. My Lords, for the opinion of that learned and able judge I entertain a deep respect, and it is with reluctance that I venture to differ from the views he expressed. He held, and his judgment was given for the other members of the Court also, that by the terms of the resettlement the tenant for life had granted away his life estate under the will, and had taken a wholly

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new one, and that the words of restoration and confirmation did not affect this, for they merely kept alive the powers incident to the old estate although that estate itself was not kept alive. He was of opinion that the judgments of Pearson J. in *In re Wright's Trustees and Marshall* (1) and of Farwell J. in *In re Cornwallis-West and Munro's Contract* (2) were wrong, and that they had misinterpreted what was said by Lord St. Leonards in *Harrison* v. *Round*. (3) He thought that the judgment in *In re Mundy and Roper's Contract* (4) supported his view. It was not true that when the whole estate of the donee of the power was destroyed the old use could be restored.

My Lords, for reasons already given, I am unable to agree with the view that the old estate was destroyed. And I am unable to find that the judgment of Chitty L.J. in *In re Mundy and Roper's Contract* (4) lends support to that conclusion. That case was concerned with a different question, whether there was what was in effect a compound settlement. No doubt Chitty L.J. said that the object of the words of restoration which occurred was only to keep alive the old powers; he held that in the construction of the series of deeds constituting the resettlement it had been thought unnecessary to keep alive the old life estate, and that, having regard to the jointure and portions reserved, the life estate introduced was a new one. That may well have been the case having regard to the terms of the deeds there, for the question of what constituted the compound settlement within the meaning of the Settled Land Acts was the only question which arose. What is of the essence of the case is that, as Chitty L.J. points out (5), the life estate created by the resettlement was not, as matter of construction, limited so as to bring back simply the old life estate.

Nor, my Lords, does it seem to me that *Harrison* v. *Round* (3) was decided by Lord St. Leonards, as Swinfen Eady M.R. held, on the limited view of the operation of the recovery

(1) 28 Ch. D. 93.
(2) [1903] 2 Ch. 150.
(3) 2 D. M. & G. 190.
(4) [1899] 1 Ch. 275.
(5) [1899] 1 Ch. 294.

which he states. What Lord St. Leonards appears to me to have really held was that there were no new estates raised by the operation of such a recovery, but that the original estates remained intact, as matter of principle, notwithstanding the protection of the powers from ransacking by a conveyance of the particular kind employed.

I am therefore of opinion that the judgment in *In re Constable's Settled Estates* (1) was not warranted so far as concerns the dicta cited to us. The question of whether it was right as to the particular point it decided in reference to the Settled Land Acts is not before us. I will only add that I do not think that the insertion of the 100,000*l.* clause or the reservation of a reversion of the life estate were considered by Lord St. Leonards in *Harrison* v. *Round* (2) as making any difference in the application of the principle he laid down. These provisions had probably been inserted by the conveyancers to obviate any possible ransacking effect of the recovery there suffered on the existing powers. I wish to add that I do not think that either s. 3 of the Inheritance Act of 1832 or s. 23 of the Fines and Recoveries Act are directed to any such point as is before us, and that they do not affect it.

My Lords, did the decision of this appeal rest with me I should hold that the appellants were entitled to succeed.

LORD ATKINSON. My Lords, the question for decision in this case is whether two estates, each composed of real and personal property—for convenience styled respectively the free estate and the settled estate—of the first of which one Joseph Charlton Parr died possessed on February 27, 1920, and of the second of which he was at that date tenant for life in possession, must be aggregated for the purpose of determining what, on the death of that gentleman, was the rate of estate duty payable under the provisions of the fourth section of the Finance Act of 1894, whether the free estate was to be aggregated with the settled estate, or whether the latter estate is exempted from this aggregation under s. 12, sub-s. 2, of the Finance Act of 1900, coupled with

(1) [1919] 1 Ch. 178. (2) 2 D. M. & G. 190.

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s. 16 of the Finance Act of 1907. This question resolves itself in effect into two questions—namely, first whether the interest in the settled estates of which Joseph Charlton Parr was possessed, passed from him on his death, under the will of Thomas Parr dated July 1, 1869, or under a disentailing assurance dated November 4, 1895, to which he was a party, coupled with an indenture of resettlement dated December 19, 1895, to which he was also a party. The second question is what is the true construction of the words "under a disposition" in s. 12, sub-s. 2, of the Finance Act of 1900? To answer these questions it is necessary to consider the limitations of this settled estate under the will of Thomas Parr, who died in 1870, out of which these questions arise. The settled estate was by that will devised to Joseph Charlton Parr for life, with remainder to the use of his sons successively in tail male. In 1895 Joseph Charlton Parr and his eldest son, Roger Charlton Parr, concurred in executing a disentailing deed conveying the property to a grantee to hold the same to such uses as the father and his said son should jointly appoint. By an assurance of resettlement of December 19, 1895, the settled estate was appointed and conveyed to such uses as Joseph Charlton Parr and his aforesaid son should jointly appoint, and in default of appointment to certain other uses.

It is essential, I think, for the purpose of dealing with the contention of the appellants on this appeal, to set out at some length the relevant dispositions contained in the deed of December 19, 1895. First, it contains a recital that Joseph Charlton Parr and his son Roger Charlton Parr, in exercise of the powers given to them by the disentailing deed of November 4, 1895, jointly appoint the properties in the several schedules thereto described, subject to the jointures and portions mentioned therein and charged thereon, to the uses and the trusts thereinafter declared. By this deed Joseph Charlton Parr, significantly described as the settlor, grants to two trustees to such uses, subject to certain conditions therein mentioned, as he shall appoint, and in default of appointment to the use that Roger Charlton Parr, his

son, shall, on reaching twenty-five years of age, receive an annuity of 500*l.* per annum, to be increased on his attaining thirty years of age to 700*l.* per annum, and upon his marriage, in his father's lifetime with his father's consent, to 2000*l.* per annum. There is then a provision for the widow of Roger Charlton Parr, should he, having married with his father's consent, die in the latter's lifetime. Then follows the limitation upon which the question for decision, in this case, turns. It runs thus: "To the use of Joseph Charlton Parr for his life without impeachment of waste, and by way of restoration and confirmation as regards the premises hereinbefore appointed of his present life estate therein under the said will of the said Thomas Parr together with all the existing powers of the said Joseph Charlton Parr under the same will of jointuring any after taken wife, and also all his existing powers under the same will of charging portions for his younger children and annual sums for their maintenance and education so far as the same shall have not already been exercised and all powers of leasing sale and exchange and partitions annexed to or exercisable or capable of taking effect during the continuance of such life estate under and by virtue of the same will, or the Settled Land Acts."

It appears to me to be perfectly clear—indeed, it has not, I think, been disputed—that if all the words from the word "waste" to the words "or the Settled Land Acts" had been omitted from this passage, Joseph Charlton Parr would have taken a new estate for life in the appointed lands under and by virtue of this resettlement deed of December 19, 1895. It is equally clear that it was designed and intended by the settlor, and the other parties to this deed, that he, the settlor, should be able to exercise over the appointed lands, in which he might acquire under the resettlement a new estate for life, powers similar to and co-extensive with all the powers he was entitled to exercise over the old estate for life given to him by his father's will. This would be a most natural and reasonable provision if he really got a new life estate under the resettlement, but if he got no new estate

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for life under the settlement then it certainly appears to me that all these provisions authorizing the exercise of powers which he already possessed and was entitled to exercise over the old estates for life would be irrational. These provisions are, I think, the very best proof that the authors of, and parties to, this resettlement deed believed that the settlor took a new estate for life under it, to which it was necessary to provide that these powers should apply. It was, as I understood, contended on behalf of the appellants that for the purposes of the Finance Acts one must have regard to the real nature of the transaction which the parties to such instruments as these desired and intended to carry out, that the two deeds of November 4, 1895, and December 19, 1895, are to be treated as two parts of one transaction, carrying out a purpose arranged between the father and son before the earlier of the two deeds was executed, and that the effect of this "restoration and confirmation" clause is to secure and preserve to Joseph Charlton Parr the life interest which he had under the will of his father, Thomas Parr, together presumably with the life interest in the same estate, limited to him by the deed of December 19, 1895. It was not contended on behalf of the appellants, as I understood, that the two deeds of November and December, 1895, did not convey to Joseph Charlton Parr any life interest whatever in the settled estate. If they did convey to him such an interest, then on the execution of the second of these deeds Joseph Charlton Parr must have had in him at the same moment two life estates in the same subject matter, one the testamentary life estate, if I may so style it, coming to him under his father's will, and the other the life estate limited to him by the deeds of November and December of 1895. To my mind that appears to be a strange and, indeed, an almost incomprehensible result, whereas if the true legal effect of the two deeds is to convey away from Joseph Charlton Parr his testamentary life estate, and to give him in lieu thereof, by force of the deeds, another life estate in this same property, that would, I think, be at all events a quite rational and reasonable result, and the

provision I have already referred to touching the power reserved to him would strongly support that conclusion.

On the hearing of the appeal much argument was bestowed upon the question of the meaning, origin, and effect of "restoration and confirmation" clauses similar to that used in the deed of December 19, 1895, and many authorities were cited on this point. I do not propose to review them all. I think it is only necessary to refer to the more modern of them. Modern legislation, especially the Settled Land Act of 1882, has secured to tenants for life of settled estates as wide and more effective powers than it was the sole object and function of this clause to secure to them. I will first refer, therefore, to the case of *In re Mundy and Roper's Contract.* (1) That case was decided in appeal by Chitty L.J. and Lindley M.R., as he then was, and the judgment of the Court was delivered by the former. It was stated in the head-note of that case that by a deed dated in the year 1861 certain lands were settled upon A. for life with remainder to his first and other sons in tail male. In exercise of a power by it reserved to A. upon his marriage, he, in 1865, by deed charged these lands with a jointure rentcharge for his wife and with portions for his younger children, both charges being secured by terms of years in the usual way. In the year 1889, in order to carry out a family arrangement, A. and his eldest son B. by a deed, identified as No. 1 disentailing deed, disentailed these lands, and by deed, identified as No. 2 deed, in exercise of the powers contained in deed No. 1 appointed these lands to A. for life with remainder over without, however, in terms expressing that this life estate was limited to A. in "restoration or confirmation" of his former life estate. It was held that the deed No. 2 of 1889 should not under the circumstances of the case be treated as the only settlement of the property, but should be treated as constituting with three deeds, of earlier date, a settlement within the meaning of the Settled Land Act of 1882, ss. 2 and 20, and that, accordingly, it was competent for A. to sell the lands and make a good title to them

(1) [1899] 1 Ch. 275.

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discharged from the jointure and portions, on trustees of this settlement being appointed to receive the purchase money.

Chitty L.J., in delivering judgment (1), after referring to the life estate vested in A. by deed No. 2, said: "But this life estate was not in terms limited to him in restoration of his old life estate. The object of this restoration is well known; it was to keep alive the old powers annexed to the life estate: see 3 Davidson's Precedents, 3rd ed., pp. 594 et seq. Regard being had to the limitation in the disentailing deed in default of appointment, it would appear to have been thought unnecessary to restore the old life estate, because the powers to jointure and appoint portions had already been exercised by the vendor by the deed of 1865; and as to the leasing powers in the deed of 1861, it was thought unnecessary to keep them any longer on foot, seeing that the vendor, as tenant for life under the resettlement, had ample powers of leasing by virtue of the Settled Land Acts. But, however this may be, the old life estate was not restored. . . . . The result thus far appears to me to be this. Treating the life estate of the vendor (as I think it must be treated) as a new life estate arising under the resettlement, etc."

Before the case of *Alexander* v. *Mills* (2) an opinion is stated to have prevailed that where a tenant for life parted absolutely with his interest, any powers of sale given to him or made exercisable at his request and by his direction were thereby destroyed. The argument was that being powers appendant to the estate they were extinguished by the entire alienation of it. This was Lord St. Leonards' opinion: Sugden on Powers, 8th ed. (1861), p. 57. The Court of Appeal in this case decided the contrary, and James L.J., in delivering the judgment of the Court (3), said: "The only thing really pressed on us against these decisions" (i.e., the decisions in *Long* v. *Rankin* (4); *Holdsworth* v. *Goose* (5); and *Eisdell* v. *Hammersley* (6) "is that

(1) [1899] 1 Ch. 294.
(2) L. R. 6 Ch. 124.
(3) L. R. 6 Ch. 135.
(4) Sugden on Powers, 8th ed., p. 895.
(5) (1861) 29 Beav. 111.
(6) (1862) 31 Beav. 255.

Lord St. Leonards, in successive editions of his work on Powers, has treated each case as limited to the circumstances of that case, and has declined to recognise them as establishing the broad principle that, so long as nothing is done in derogation of the alienee's estate, the alienation has no operation on the power. We cannot set this limitation on the part of this eminent author against the judicial decisions themselves."

The case of *Harrison* v. *Round* (1) was apparently relied upon by Pearson J. in the case of *In re Wright's Trustees and Marshall* (2) to support the opinion he then expressed, an opinion subsequently adopted by Farwell J. in *In re Cornwallis-West and Munro's Contract.* (3) These two cases were much relied upon by the appellants' counsel as authorities in the present appeal. But in the case of *In re Constable's Settled Estates* (4), Swinfen Eady M.R., in the course of his judgment, expressed a confident opinion that the case of *Harrison* v. *Round* (1) did not support the conclusions at which these two learned judges had respectively arrived in these two cases. The Master of the Rolls supports the conclusion at which he himself arrived by some lengthy passages from the judgment of Lord St. Leonards in *Harrison* v. *Round* (1), in which the Lord Chancellor, in dealing with the facts of the case, and explaining the grounds of his decision, said (5):

"By the recovery deed, the father and son conveyed, in the way which was at that time usual when deeds of that kind were well prepared, they conveyed to the tenant of the præcipe during the joint lives of the father and of the person to whom the conveyance was made, so as to leave in the father a reversion of his life estate; and there was also what was called the 100,000*l.* clause for the purpose of avoiding the conveyance. All this shows that, as far as regarded the father's estate, the parties intended to leave it, as far as they could, unaffected by the operation of the recovery and the uses declared by the deed: these uses were to the joint appointment of the father and son, and

(1) 2 D. M. & G. 190.
(2) 28 Ch. D. 93.
(3) [1903] 2 Ch. 150.
(4) [1919] 1 Ch. 178, 195.
(5) 2 D. M. & G. 200.

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in default of and until such appointment to the same uses to which the premises were previously limited." The Lord Chancellor then read the clause in question and continued: "The effect of this was, that, subject to the exercise of the power of appointment by the father and son, the estate remained precisely in the same position as if the recovery had not been suffered; and if no mortgage had been created, it is impossible to say that the strict terms of the proviso in question would not have been answered, when the second son after the death of his father came into possession of the Copford Hall Estate. The recovery did not so alter the estate as to prevent the operation of the proviso, for no rule of law would in such a case prevent the original intention of the parties from having its full effect and operation." Farwell J., when giving judgment in the case *In re Cornwallis-West and Munro's Contract* (1), expressly stated that he was only following the decision of Pearson J. in *In re Wright's Trustees and Marshall.* (2) I shall deal with the decision of his guide presently.

In *In re Wright's Trustees and Marshall* (2) the facts were that John Wright died in 1840, having by his will, dated in 1835, devised certain lands to certain uses for the purpose of raising annuities, with the usual powers of distress and re-entry for enforcing the payment of the same, and subject to these annuities and powers to the use of trustees for a term, and subject thereto to the use of the testator's son, Francis, for life with remainder to the testator's grandson, John Osmaston (then John Wright), for life, with remainder to the first and other sons of this John Osmaston in tail male. The testator declared by his will that it should be lawful for the trustees of the will, at the request of the person who *by virtue of the testator's will, should be tenant for life in possession* or in tail male or in tail in possession of any of the hereditaments thereinbefore devised, or any part thereof, or be entitled to the rents and profits of any of the said hereditaments or any part thereof respectively, and who should have attained the age of twenty-one years, to sell or exchange all or any part of the devised hereditaments. The first son

(1) [1903] 2 Ch. 150. (2) 28 Ch. D. 93.

of the testator having died, John Osmaston and his son Francis Osmaston, the testator's great-grandson, executed a disentailing deed by which they granted the estates settled by the testator's will *subject and without prejudice* to the uses and estates by the said will limited which were prior to the estate in tail male of Francis Osmaston (other than the uses or estates limited to *John Osmaston during his life*) and to the powers annexed to such prior uses and estates or exercisable during the continuance thereof, so far as the same uses or powers were then subsisting or capable of taking effect, and to such charges as were subsisting on the life estates of John Osmaston to such uses as John Osmaston and Francis Osmaston should appoint and in default of appointment to the uses of the will.

John and Francis Osmaston exercised the power of appointment over part of the estates by way of mortgage for the benefit of the tenant for life and by deed dated June 22, 1878, resettled the whole of the estate to various uses, and ultimately to the use of John Osmaston and his assigns during his life without impediment of waste in *restoration and by way of continuance and confirmation of the former life* estate of the said John Osmaston under or by virtue of the said will and codicil, with remainders over. Pearson J. held that the provisions of this complicated will revealed an intention on the part of the parties concerned merely to displace pro tanto the life estate, but subject to that to preserve the life estate of John Osmaston under the will. He purported to base this conclusion on the authority of *Harrison* v. *Round* (1), but Swinfen Eady M.R. in *Constable's* case (2) in my view conclusively established that this case is not at all an authority supporting the conclusion on the point at which Pearson J. arrived.

The last case which I think it necessary to cite at any length is that of *In re Constable's Settled Estates.* (2) The facts are, with perhaps the exception of the particular clause on which the question for decision turns, set out accurately and with sufficient fullness in the headnote, but it may be

(1) 2 D. M. & G. 190. (2) [1919] 1 Ch. 178.

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desirable to set out in extenso this last mentioned clause. At the date of a certain disentailing deed lands were by a will settled to the use of G. for life with remainder to his son C. in tail male. In 1895 G., under powers conferred by this will, appointed a jointure to his wife and portions for younger children. In July, 1912, seventeen years later, G. and C. by a deed disentailed the estate and conveyed it (subject to charges and encumbrances and to G.'s life's estate) to such uses as G. and C. should jointly appoint, and in default of appointment to the uses and upon the trusts of the will. In October, 1912, by a deed of resettlement the property was appointed, subject to the said charges and to the jointure and portions, to such powers as G. and C. should jointly appoint, and subject to any such appointment to the use of G. for life *in restoration* and by *way of confirmation of his life estate*, with all powers of jointuring and granting portions and all other statutory powers annexed to or exercisable during the continuance of such life estate or estates, and so that they might be exercisable with the same overreaching effect as if the disentailing deed and the deed of appointment had not been executed.

Colonel Constable, the person indicated by the letter G. in the headnote, was, as tenant for life under the resettlement of October 22, 1912, desirous of exercising, with the consent of the jointuress and the portioners, the powers conferred upon him as tenant for life by the Settled Land Acts, and also the extended and enlarged powers conferred upon him by the resettlement. He applied by originating summons for a declaration that he was tenant for life under the resettlement within the meaning of the Settled Land Acts. Captain Constable, his son, and the trustees were the respondents. Upon the summons coming on before Sargant J., as he then was, he did not make any order upon it, considering himself bound by the decision in *In re Cornwallis-West and Munro's Contract.* (1) He says (2): "While that case was unexplained there were obvious objections to it," but that, as explained in *In re Lord Wimborne and Browne's Contract* (3),

(1) [1903] 2 Ch. 150. (2) [1919] 1 Ch. 183. (3) [1904] 1 Ch. 537, 542.

he thought it was right. This explanation is that Farwell J. had said that the true explanation of the *Cornwallis-West* case (1) was that as the old life estate created under the will was restored, the seller could not confer a good title under the resettlement alone, as he proposed to do; and as there were no trustees for the purpose of the Settled Land Acts of the settlement created by the will, neither could the tenant for life, as matters then stood, sell under the will alone.

Speaking for myself, I may say that the more I study the cases I have cited up to this, the more difficult I find it to discover any rational and consistent principle upon which they have been decided. The effect of the "*restoration and confirmation*" clause, it has been contended and indeed decided, is to show that the parties to the disentailing and resettlement assurances intended that the old life estate under the will should be restored and that these instruments must be construed so as to carry out that intention; but if it be restored, no clear intimation is given as to the effect of that restoration of the life estate conferred by the resettlement upon the tenancy for life given by the will. It is not contended that there is any merger of the tenancy for life granted by the resettlement in that which I may style the testamentary tenancy for life, or any supersession or destruction of the one by the existence of the other, or that they can co-exist. So that until this is solved one is driven to accept the contention put forward by counsel on behalf of the respondent in *Constable's* case (2) as the more reasonable and natural result—namely, that the object of the restoration clause was, as Chitty L.J. and the then Master of the Rolls pointed out in *In re Mundy and Roper's Contract* (3), to keep alive the powers annexed to the old life estate, so that though the tenant for life had alienated the old life estate, he might continue to possess and enjoy them and exercise them over the new life estate: *Alexander* v. *Mills* (4); Settled Land Act, 1882, s. 50, sub-ss. 1, 2.

Swinfen Eady M.R. at p. 194 of the report of *Constable's*

(1) [1903] 2 Ch. 150.
(2) [1919] 1 Ch. 178.
(3) [1899] 1 Ch. 275.
(4) L. R. 6 Ch. 124.

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case is reported to have said, "If the legal effect of the resettlement is to convey his old life estate, and to give him in lieu of it another life estate under that instrument (as in our opinion it is) (see 3 & 4 Will. 4, c. 106, s. 3, and Davidson, 3rd ed., vol. iii., p. 596), this legal effect is not prevented by saying that the life estate under the resettlement is in restoration and by way of confirmation of his old life estate," and again, at p. 196 of the report, he says: "The clause" (i.e., the restoration clause) "is sufficient to show an intention of keeping alive these powers" (i.e., the old powers annexed to the life estate), "although ineffectual to restore the same life estate when the operative words of the deed are sufficient to pass it." In my view that statement of the case is rational and sound. The Court accordingly declared that the appellant was entitled to a declaration that he was tenant for life under the resettlement of the property thereby settled, and as such could exercise over the property the powers conferred by the Settled Land Acts, 1882 to 1890, and also by the resettlement conferred upon a person for the time being tenant for life within the meaning of the Acts. This decision applies, I think, to this case. It rules it, I think. If that be so, then the disposition mentioned in s. 12, sub-s. 2, must apply to the resettlement. The word "property" used in this sub-section must mean, I think, the property out of which the life interest is carved. The settlement "disposed" of that within the meaning of the section. I think the appeal should therefore be dismissed with costs.

LORD BUCKMASTER (read by LORD BLANESBURGH). My Lords, in order that the appellants should succeed in this case they are bound to establish that the life estate limited in favour of Joseph Parr by the will of Thomas Parr the testator, was not disturbed by the deed of resettlement, and also that the settled estate passed on the death of Joseph Parr under the testator's will. In my opinion they succeed upon the first of these contentions and fail on the second. There is no dispute that the original life estate in favour of Joseph Parr was unaffected by the execution of the disentailing

assurance, although the effect of this deed was completely to destroy all the estates in succession to this life interest, and to create powers of joint appointment in favour of Joseph Parr and Roger Parr which would have enabled the property to be settled with new or substituted life interests in favour of Joseph Parr or other people. The resettlement executed this power by limiting the property to the use of Joseph Parr for his life without impeachment of waste by way of restoration and confirmation of his present life estate therein under the will of Thomas Parr with remainders over which are not material to the present purpose. In 1884, in the case of *In re Wright's Trustees and Marshall* (1), Pearson J. decided that in similar circumstances the original life estate was undisturbed by the resettlement, a decision followed by Stirling J. in *In re Du Cane and Nettlefold's Contract* (2) and by Farwell J. in *In re Cornwallis-West and Munro's Contract.* (3) It was indeed never questioned until the case of *In re Constable* (4), when the Court of Appeal decided in plain terms that the effect of such a resettlement was to destroy the first life estate and create a new one. The judgment appears to depend upon the view that Pearson J. had assumed the case to be already determined by the decision of *Harrison* v. *Round* (5), and also upon the statement in the third volume of Davidson's Conveyancing, 3rd ed., p. 596, questioning the effect of the Inheritance Act of 1833 upon the matter. In substance it appears to me that it was really the provisions of the Inheritance Act on which the judgments of the Court of Appeal rested, but though the words of this statute if unexplained might seem to justify this conclusion, they appear to me to be necessarily affected by the view that the Act was specially passed for the purpose of limiting inquiries as to title and not for the purpose of effecting a general alteration in the law as to the construction of documents. I find it difficult to understand how an estate that is expressly limited in restoration and in confirmation of an

(1) 28 Ch. D. 93.
(2) [1898] 2 Ch. 96.
(3) [1903] 2 Ch. 150.
(4) [1919] 1 Ch. 178.
(5) 2 D. M. & G. 190.

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estate of exactly the same quality can be regarded as defeating that estate and creating a new one. The word "restoration," though it might suggest that the original life estate had suffered some change, to my mind amounts to no more than saying that it must be treated as still on foot, and the word "confirmation" has no real meaning if it once be assumed that the estate has been destroyed. It must be remembered that these words have for many years been used by learned conveyancers whose preciseness of language has often been the subject of undeserved reproach, and it is to my mind impossible to assume that they meant the opposite of what they say, for you cannot "confirm" what does not exist. In the case before Chitty L.J., *In re Mundy and Roper's Contract* (1), the learned judge was expressly dealing with a case where the resettlement omitted the critical words, and he draws the contrast between the two positions. It was indeed argued from the dicta of Chitty L.J. in this case that the object and result of the use of the words was to keep alive powers attached to the old estate, but I fail to see how powers appurtenant to an estate can be kept alive without also preserving the estate. A parasite cannot exist without its host. The law as stated in Sugden on Powers, 8th ed., p. 71, is an express opinion in direct opposition to *In re Constable* (2), and the view there stated is in my opinion correct. I think, therefore, that *In re Constable* should be treated as overruled.

The remaining question is to my mind one of greater difficulty. The property undoubtedly passed on the death of Joseph Parr, and in s. 2 of the Finance Act of 1894 nothing further is required than that the property should so pass; for the purposes of that section the disposition under which it passes is immaterial and the phrase is not used. In s. 4, however, it is provided that if the deceased never had any interest in the property so passing, or if it passed "under a disposition" not made by the deceased to some person other than the wife or husband or lineal ancestor or descendant of the deceased, it should not be

(1) [1899] 1 Ch. 275, 294. (2) [1919] 1 Ch. 178.

aggregated. In this section it is plain that passing under a disposition must involve the disposition that directs to whom the property shall pass and not a disposition that merely provides the event upon the happening of which it passes —and it is this section that is modified by s. 12 of the Act of 1900, which contains the relevant provisions for the present purpose. As its terms have already been stated there is no need that they should be repeated. The real point is, did the property in the present case pass under the will of the testator or under the resettlement within the meaning of that section? That it passed upon the event provided by the will of the testator is plain—but I find it difficult to see that it passed "under" the will. To pass under a disposition appears to me to mean something more than passing on the happening of an event prescribed by an instrument. To my mind it includes the instrument whose trusts are operative immediately the event takes place—this was in the present case the resettlement—and I therefore think that the contention of the Crown is right and that this appeal should fail.

LORD CARSON. My Lords, I had the advantage of hearing this case argued on both occasions, and at the end of the second hearing I found the opinion I had formed at the first hearing, and which I understood was shared by the majority of the Court on that occasion, unaltered. In my opinion the appeal fails, and having regard to the very full statements made by the noble Lords who have preceded me I shall be able to state my reasons very briefly. My Lords, I think the whole question turns upon the construction of the relevant sections of the Finance Acts of 1894 and 1900 respectively. Apart altogether from the position of the tenant for life, it is necessary under s. 4 of the Act of 1894, if the exception as to aggregation is to be applied, to ascertain to whom the estate passes and the interest passing; and likewise under s. 12 of the Act of 1900, in order to apply it you have to find the disponee and to consult the disposition under which he is clothed with that character, and thus in my opinion in all the relevant sections "disposition" means the same thing—

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namely, the effective disposition under which the property passes.

Turning then to the disentailing assurance and the resettlement in the present case you find, after the execution of the former, the property in the possession of persons who have complete title and control electing, as they had a right to do, to make the resettlement which was to be the effective disposition after the death of the tenant for life. It is a new starting point in the title, and the old estates limited by the will have ceased to exist. If, therefore, under s. 4, we have to ascertain what is the disposition that provides to whom the property shall pass, I am of opinion that one answer only can be given—namely, that it passed under the deed of resettlement. My Lords, once that conclusion has been arrived at, it is in my opinion unnecessary to pursue the questions which have been so strenuously and ably argued as to the disposition under which the tenant for life held his life interest, or whether the case of *In re Constable* (1) was rightly decided —questions upon which, as the speeches made by the noble Lords who have preceded me show, your Lordships are not agreed. I shall only add that so far as my opinion is concerned I must not be taken as concurring in the view that the life estate of Joseph continued to be derived under the will of the testator after the execution of the resettlement or that the judgment in *In re Constable* (1) was wrong. In my opinion the appeal should be dismissed.

LORD BLANESBURGH. My Lords, the appellants here claim that the settled property which passed on the death of Joseph Charlton Parr ought not, for the purposes of estate duty, to be aggregated with his free estate, but ought to be treated as an estate by itself.

Now it would appear that the relevant sections of the Finance Acts upon which that claim rests are open at any rate to two constructions, and the case of the appellants, as I see it, is in its last analysis dependent entirely upon the question which of these constructions is correct. If by the

(1) [1919] 1 Ch. 178.

statutes your Lordships are required to ascertain what was the disposition under which the interest of the deceased in the settled property was enjoyed by him during life and ceased with his death, as has been assumed in the Courts below, then the correctness or otherwise of the decision of the Court of Appeal in *In re Constable* (1) may be decisive of the appellants' claim. But if, on the other hand, the disposition which by these sections has alone to be sought for is that under which the settled property passed on the death of the deceased to his son Roger, then *In re Constable* (1) ceases even to be relevant to the issue. If this last be the true inquiry, the appellants would be no nearer success in their appeal if their destructive criticism of that decision were as devastating in its effect as will be the legislative enactment on the subject which comes into force in a few days' time. It is important, therefore, to settle this question of construction at once, and with that object in view I venture to invite your Lordships' attention to the relevant provisions of the statutes —fortunately few in number.

And, first of all, it is desirable to bear in mind the definition there to be found of "settled property," words which, as will be seen, are very important in this inquiry. That expression, by s. 22, sub-s. 1 (*h*), of the Act of 1894, means property comprised in a settlement, and "settlement," which by sub-s. 1 (*i*) includes a settlement effected by a parol trust, is, quoad ultra, defined by reference to the Settled Land Act, 1882, and may, for present purposes, be described as being any instrument or number of instruments under or by virtue of which any real or personal property stands for the time being limited to or in trust for any persons by way of succession.

Coming next to the relevant sections of the statutes, s. 1 of the Act of 1894 is already under your Lordships' notice. The settled property in the present case—the entire estate—"passed" under that section on the death of Joseph Charlton Parr, and estate duty in respect of that entire estate thereupon became chargeable thereunder. It became so chargeable

(1) [1919] 1 Ch. 178.

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merely because of the death of Joseph Charlton Parr, and irrespective of any question touching either the origin of the property or its destination. Sect. 2 of the Act, which describes the property which is to be deemed to pass on death, has no reference to anything with which we are now concerned, and need not be further adverted to.

Sect. 4 is the aggregation section on which, as subsequently amended and added to, the whole matter turns. I venture to transcribe it at length, as originally enacted, italicising those portions of the section which were struck out by the Act of 1900 and then superseded by the sub-section with which we are now directly concerned, added by that statute and the Act of 1907.

"4. For determining the rate of estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof:

"Provided that any property so passing, in which the deceased never had an interest, *or which under a disposition not made by the deceased passes immediately on the death of the deceased to some person other than the wife, or husband, or a lineal ancestor or lineal descendant of the deceased,* shall not be aggregated with any other property but shall be an estate by itself, and the estate duty shall be levied at the proper graduated rate on the principal value thereof; *but if any benefit under a disposition not made by the deceased is reserved or given to the wife, or husband, or a lineal ancestor or a lineal descendant of the deceased, such benefit shall be aggregated with property of the deceased for the purpose of determining the rate of estate duty.*"

I make, my Lords, three observations upon this section as it originally stood. The first is, that by way of contrast in this respect to s. 1, under which the duty is chargeable, the exemption of any property from aggregation by this section is made dependent upon two conditions, relating the one to the origin, the other to the destination of the property. The "disposition" must not have been made by the

deceased. Under that disposition again the property on the death of the deceased must pass to some one who may be compendiously described as a stranger to his family. It is not the interest taken in the property by the deceased himself that is of any importance. The essential and determining factor is the description of the person to whom under the disposition not made by himself the property passes on his death.

The next observation I make is this. Excluding—as by the first part of the proviso there is excluded from the property dealt with by the second part—any property in which the deceased never had an interest, this property secondly dealt with, although not in terms so described—clearly, as I think, because the character of the succession is itself prescribed by the section—is necessarily "settled property" as above defined, a consideration the importance of which will emerge when we come, as we do now, to the amending Act of 1900.

By that Act, the words above italicised in s. 4 of the Act of 1894 are repealed, and they are replaced by a sub-section which, as further amended by the Act of 1907, now reads in effect as follows:

"Where settled property passes, or is deemed to pass, on the death of a person dying on or after the 19th April, 1907, under a disposition made by a person dying on or before the 1st of August, 1894, and such property would, if the disponer had died after the 1st of August, 1894, have been liable to estate duty upon his death, such property shall be treated as an estate by itself."

Now, my Lords, this is the provision upon which must be rested the whole claim of the appellants. What does it mean?

Note first of all the relevant changes made by it in the conditions of exemption from aggregation prescribed by the original section. First, the disposition must not only have been made by some person other than the deceased: it must now have been made by some one dying before the passing of the principal Act. Secondly, if that condition

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be complied with, then the exemption follows, irrespective of the relationship to the deceased of the person to whom the property goes under that disposition. That disqualification being eliminated, the destination of the property is no longer, as such, referred to. But note how the necessity for its being prescribed by the disposition is preserved. Note the change in the introductory words. For the words in the proviso to s. 4 of the 1894 Act " Provided that any *property* so passing " we have now the words " Where *settled property* passes "—that is to say, property which might have fittingly been so described in s. 4 if such description would not there have been redundant, is now so described when, by the elimination of the disqualification just referred to, that description becomes essential if in the new clause, as in the original clause, the destination of the property after the death of the deceased is the destination which must be prescribed by the " disposition."

And, my Lords, not only is this, as it seems to me, the natural construction of the words. It is the construction also which is demanded by the reason of the thing. For it is the successor to the settled property and not the deceased himself who derives any benefit from the exemption. That benefit in turn is entirely due to the disponer. Surely then the successor and not the deceased is the person to be designated by the disponer from whom all the benefit proceeds. As under the original s. 4, so now.

Accordingly, my Lords, I reach the conclusion without difficulty that under the amended section, as clearly as under the section unamended, the condition of exemption of any settled property from aggregation is that on the death of the deceased it shall pass to some one else under a disposition of the required description which so prescribes. Applying that conclusion to the present case the appellants here must fail in their contention unless they are able to establish that the settled property passed under the will of Thomas Parr to Roger Charlton Parr on the death of his father, the deceased.

My Lords, I believe that all your Lordships are of opinion

that the appellants cannot make good that position. As the noble Viscount on the Woolsack has observed, there can be no doubt that the remainders limited by the deed of resettlement after the life estate restored and confirmed to Joseph Charlton Parr were new estates created by the resettlement itself. If further authority for that view be required it is supplied in ample measure by the cases of *Lord Braybrooke* v. *Attorney-General* (1) and *Attorney-General* v. *Floyer*. (2) These cases, cited by Mr. Maugham for another purpose, show that not only were these remainders not taken under the will of the testator: they show that they were taken under the resettlement, which for this purpose may even be treated as a disposition by Roger Charlton Parr himself: see too *Attorney-General* v. *Cecil*. (3)

This conclusion dispenses me from the necessity of dealing with the case of *In re Constable*. (4) It remains unaffected by any view that may be taken of that case. Accordingly I will only say with reference to it that in my view the life estate in these settled properties of which the deceased was seised at the date of his death was the life estate limited by the testator's will. I would reassure Atkin L.J. by adding that I do not reach that result by attributing magical or uncanny results to any conveyancing incantations, but merely by giving effect to the intention of the parties to the deed of resettlement, expressed as that intention is in language too clear to be misunderstood.

There are more ways than one of giving it full effect. The *words* of appointment may, in order to effectuate the intention, be treated as a release to the necessary extent of the joint power of appointment: alternatively, the life interest may be treated as if it were one taken in default of appointment notwithstanding the form of the deed. I am not unmindful of the cases of *Sweetapple* v. *Horlock* (5); *Lovett* v. *Lovett* (6); *In re Rush* (7), so strongly relied upon by

(1) 9 H. L. C. 150.
(2) 9 H. L. C. 477.
(3) (1870) L. R. 5 Ex. 263.
(4) [1919] 1 Ch. 178.
(5) 11 Ch. D. 745.
(6) [1898] 1 Ch. 82.
(7) [1922] 1 Ch. 302.

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Mr. Clauson, nor do I doubt that an appointed estate, albeit the same in every material respect, is normally a different estate from that which the appointee holds in default of appointment. But I do not find that in any of these cases the Court was dealing with an appointment in which it was expressed or intended, as it is here both expressed and intended, that the appointed estate shall be the old unappointed estate. Where that intention is clearly manifested I do not see why, if within the competence of the appointor to make it effective, it should not have full effect.

Accordingly, I myself find no difficulty in adhering on well established principle to a view of provisions like the present, which prior to *In re Constable* (1) was so well settled and so frequently acted upon. I think that *In re Constable* (1) in this respect was wrong.

But in the result that conclusion does not, as I have already said, help the appellants at all. Their appeal should, I think, be dismissed with costs.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, Dec. 18, 1925.

Solicitors for the appellants: *Balderston, Warren & Co., for Robert Davies & Co., Warrington.*

Solicitor for the respondent: *Solicitor of Inland Revenue.*

(1) [1919] 1 Ch. 178.

[HOUSE OF LORDS.]

LAPISH . . . . . APPELLANT ; H. L. (E.)*

AND 1926

BRAITHWAITE . . . . . RESPONDENT. *Jan.* 19.

Municipal Corporation—Councillor—Alderman—Disqualification—Share or Interest in Contract—Shareholder and Managing Director of Company having current Contract with Council—Municipal Corporations Act, 1882 (45 *&* 46 *Vict. c.* 50), *ss.* 12, 14, 41.

An alderman, who is also a shareholder and managing director of companies having current contracts with the borough council, if he is paid as managing director by salary and not by commission, is not disqualified for being an alderman under ss. 12 and 14 of the Municipal Corporations Act, 1882, as a person having a share or interest in any contract with the council.

Decision of the Court of Appeal [1925] 1 K. B. 474 affirmed.

APPEAL from an order of the Court of Appeal (1), reversing by a majority (Bankes and Scrutton L.JJ.; Atkin L.J. dissenting) a judgment of Bailhache J.

The following statement is taken from the opinion of the Lord Chancellor :—

"My Lords, on the 4th July, 1923, the respondent, as an alderman of the city of Leeds, attended a meeting of the City Council and voted upon a resolution. At that time, four companies incorporated under the Companies Act—namely, the Leeds Sand and Gravel Co., Ld., B. Whitaker & Sons, Ld., B. Whitaker & Sons (1923), Ld., and Haulage (Leeds), Ld.—had running contracts with the Council for the supply of goods or for haulage; and the respondent held a number of shares in each of those companies, and was the managing director of them all As managing director of B. Whitaker & Sons (1923), Ld., he was entitled to a salary at the rate of 2400*l.* per annum; it was not proved that he was entitled to any remuneration as managing director of the other companies, which were more or less closely connected with B. Whitaker & Sons (1923), Ld.

* *Present:* VISCOUNT CAVE L.C., LORD ATKINSON, LORD BUCKMASTER, LORD CARSON, and LORD BLANESBURGH.

(1) [1925] 1 K. B. 474.

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In these circumstances the appellant, alleging that the respondent as a shareholder and the managing director of the above mentioned companies was directly or indirectly interested in their contracts with the Council, and was therefore disqualified under ss. 12 and 14 of the Municipal Corporations Act, 1882, for being an alderman of the city, sued him for the penalties imposed by s. 49 of the Act upon any person who acts in a corporate office while disqualified. The action was heard by the late Bailhache J., who gave judgment for the plaintiff (the present appellant) for a penalty of 10*l.*; but this judgment was reversed on appeal, and the plaintiff has appealed to this House.

The material provisions of ss. 12 and 14 of the Municipal Corporations Act, 1882, are as follows:—

'Sect. 12, sub-s. 1. A person shall be disqualified for being elected and for being a councillor, if and while he—

. . . . . .

(*c*) Has directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the council.

Sub-s. 2. But a person shall not be so disqualified, or be deemed to have any share or interest in such a contract or employment, by reason only of his having any share or interest in—

. . . . . .

(*e*) Any railway company, or any company incorporated by Act of Parliament or Royal charter, or under the Companies Act, 1862.

Sect. 14, sub-s. 3. A person shall not be qualified to be elected or to be an alderman unless he is a councillor or qualified to be a councillor.'"

1925. Nov. 26, 27. *Maugham K.C.* and *Stamp* for the appellant. The exception in sub-s. 2 of s. 12 of the Municipal Corporations Act, 1882, is limited to the passive interest of a member of a company who is nothing more than a member and does not include the active interest of the respondent in negotiating and supervising the contracts with the Council

in his capacity of managing director. The respondent has directly or indirectly a personal interest in seeing that the contracts result favourably to the companies of which he is managing director.

Sir John Simon K.C. and *W. A. Greene K.C.* (with them *Heckscher*) for the respondent.

The respondent does not come within sub-s. 1 (*c*) of s. 12 at all. "Interest" in that clause refers to such a relation between the councillor and the contract as gives the councillor some legal or equitable right arising out of or in connection with the contract. No doubt if the respondent were paid for his services as managing director wholly or partly by commission he might come within this clause, but there is no evidence of that in this case. An interest in a contract cannot mean a sentimental interest. The word "partner" points to the interest being a commercial interest. Then as to sub-s. 2 (*e*), reliance is placed upon the word "only," and Bailhache J. thought that a person who was not only a shareholder but also a managing director was disqualified, apart from the question whether a managing director had an indirect interest in the company's contracts. But a man is not disqualified simply because he is a shareholder and something more. There must be some other disqualifying fact than that of holding shares in the company.

Maugham K.C. replied.

The House took time for consideration.

1926. Jan. 19. VISCOUNT CAVE L.C. [after stating the facts and the material provisions of ss. 12 and 14 of the Municipal Corporations Act, 1882]. My Lords, it is clear that the respondent was not, under the provisions of s. 12, disqualified for being an alderman by reason only of his being a shareholder of the four companies. It may well be that as a shareholder he had an indirect interest in the contracts entered into by the four companies with the Council, and so came within the terms of sub-s. 1 of the section; for the value of his shares and his expectation of a dividend

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upon them partly depended upon the profits which might be derived from those contracts. But this indirect interest did not by itself disqualify him for membership of the Council, for it is expressly enacted by sub-s. 2 of s. 12 that a person shall not be so disqualified by reason only of his having a share or interest in a company incorporated under the Companies Act.

Nor, in my opinion, was the respondent under s. 12 of the Act disqualified by reason only of his being a managing director of the four companies. A managing director is the servant of his company; and, while he is naturally concerned in negotiating and carrying out his company's contracts, he has (if he is paid by a fixed salary and not by a percentage) no interest whether direct or indirect in the contracts themselves. Such a managing director does not come within sub-s. 1 of s. 12; and it is, therefore, unnecessary to consider whether if he came within that sub-section taken by itself, he would be excepted from it by sub-s. 2 of the same section. If indeed he were remunerated by a percentage or commission on the profits of the contracts, or on the profits of his companies available for dividend, different considerations would arise; but after considering the evidence I am satisfied that there is nothing to show that the respondent was in fact entitled to any such percentage or commission.

It remains to consider an argument put forward on behalf of the appellant, which was founded on the word "only" in s. 12, sub-s. 2, of the Act, and which appears to have prevailed with the learned trial judge. Assuming, it is said, that if the respondent had been a shareholder in the four companies and no more, he would not have been disqualified, this will not avail him in the present case; he is not only a shareholder but also the managing director of each of the companies, and therefore the disqualification which attaches to him under sub-s. 1 of s. 12 is not removed by sub-s. 2 of the same section. This point was put by Bailhache J. as follows: "It is to be observed that that exception is a qualified exception, and it is qualified by these words 'shall not be so disqualified, or be deemed to have any share or

interest in such a contract or employment, by reason only of his having any share or interest in' the company under the Companies Acts. That is to say, if a man is a shareholder and nothing more, is only a shareholder in a limited company, he is not disqualified from sitting on a corporation, although the company of which he is only a shareholder has contracts with that corporation. Now, what is the meaning of the word 'only'? Surely the very object of the word 'only' is to distinguish between a person who is merely a shareholder and a person who, in addition to being a shareholder, is something else in the company. What can a man be more in the company than managing director? I myself see no use in the words 'only a shareholder' if a managing director is also exempt. The managing director is more than a shareholder. The managing director in this case is a shareholder, therefore qua shareholder is exempt. He is not only a shareholder, but, in addition to being a shareholder, he is a managing director."

With the greatest respect for the opinion of that very learned judge, I am unable to agree with this reasoning. The sub-section does not say that if a man is a shareholder in a company and nothing more he shall not be disqualified, but that he shall not be disqualified by reason only of his being a shareholder. His interest as a shareholder does not disqualify him, and the circumstance that he adds to his position as a shareholder some other position which also has no disqualifying effect is not enough. It cannot be that by adding together two circumstances, neither of which taken alone disqualifies, you can arrive at a disqualification. In order that a corporate officer may be disqualified under s. 12, he must have a disqualifying share or interest.

For the above reasons I am of opinion that this appeal must fail; but I desire to add a few observations on the framing of the Act. When in the year 1869 (1) the exception in favour of a shareholder was first enacted, it was no doubt the view of the Legislature that a council ought not to lose the services of a capable member only because he held a few

(1) 32 & 33 Vict. c. 55, s. 5, now superseded.

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shares in some company with which the council desired to enter into contractual relations, and it was probably considered that an interest of that kind would be unlikely to exercise any prejudicial effect on the action of a member in his corporate office. But since that date the practice of forming businesses into limited companies has been greatly extended. There are now many companies in which most or substantially all of the shares are held by one man, who may also be the principal or governing director of the company, so that the business is his business in all but name; and if by reason of the exception in s. 12, sub-s. 2, such a man can remain a member of a municipal body with which his company is in contractual relations, the section will lose much of its force and value. It is not for your Lordships to suggest the manner in which this danger should be met, but it appears to me that the Legislature might well consider whether the section should not be strengthened either by extending the disqualification to persons who hold a substantial proportion of the shares in a contracting company or in some other way.

For the reasons which I have already given, I move your Lordships that this appeal be dismissed with costs.

My noble and learned friends Lord Buckmaster and Lord Blanesburgh desire me to say that they agree with this judgment.

LORD ATKINSON. My Lords, I agree.

LORD CARSON. My Lords, I also agree.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, Jan. 19, 1926.

Solicitors for the appellant: *Smiths, Fox & Sedgwick, for H. B. James & Morrish, Leeds.*

Solicitors for the respondent: *Maxwell, Simpson & Batley, for Simpson, Peckover, Curtis & Batley, Leeds.*

Referred to. ENGLISH AND SCOTTISH CASE. [1948] A. C. 405

[HOUSE OF LORDS.]

CORNISH MUTUAL ASSURANCE COMPANY, LIMITED . . . . . } APPELLANTS;

AND

COMMISSIONERS OF INLAND REVENUE . . . . . } RESPONDENTS.

H. L. (E.)* 1926 Jan. 21.

Revenue—Corporation Profits Tax—Mutual Insurance Company—"Carrying on any trade or business"—Profits—"Surplus arising from transactions with members"—Finance Act, 1920 (10 & 11 *Geo.* 5, *c.* 18), *s.* 52, *sub-s.* 2 (*a*); *s.* 53, *sub-s.* 2 (*h*).

A company incorporated in 1903 under the Companies Acts as a company limited by guarantee and having no share capital carried on a mutual fire insurance business. The number of members was unlimited, each policy holder becoming a member on the issue to him of a policy, and remaining a member so long as his right to protection by or through the company existed. The revenue of the company was derived from (*a*) entrance fees payable by members on taking up policies; (*b*) calls made upon members at the discretion of the directors; (*c*) interest on investments. These funds were applicable by the directors to the general expenses of the company, including the payment of claims under its policies. The company appealed against assessments to corporation profits tax under the Finance Act, 1920, in respect of a surplus arising from the contributions of its members:—

Held, that the company carried on a trade or business within the meaning of s. 52, sub-s. 2 (*a*), of the Finance Act, 1920, so as to become liable to be assessed to corporation profits tax, and that by virtue of s. 53, sub-s. 2 (*h*), the surplus arising from the contributions of its members was included in the profits chargeable to the tax.

In re Padstow Total Loss and Collision Assurance Association (1882) 20 Ch. D. 137 applied.

Dictum of Lord Watson in *New York Life Insurance Co.* v. *Styles* (1889) 14 App. Cas. 381, 394 explained.

Dictum of Sargant L.J. in *Inland Revenue Commissioners* v. *Eccentric Club* [1924] 1 K. B. 390, 430 overruled.

Decision of the Court of Appeal [1924] W. N. 295 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing an order of Rowlatt J. upon a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the division of West Powder, Cornwall.

* *Present:* VISCOUNT CAVE L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD SUMNER, and LORD DARLING.

(1) [1924] W. N. 295.

H. L. (E.)
1926
CORNISH MUTUAL ASSURANCE CO. v. INLAND REVENUE COMMISSIONERS.

The appellants, a mutual insurance company, appealed against assessments to corporation profits tax for the accounting periods ended June 30, 1920, and September 30, 1921, in respect of profits of 65*l.* and 3138*l.* respectively, representing a surplus arising from the contributions of the members of the company.

The Commissioners were of opinion that the accumulated fund was not profits arising from any trade or business and was therefore not liable to assessment to corporation profits tax and discharged the assessments, and their determination was affirmed by Rowlatt J. against his own opinion on the authority of Sargant L.J.'s observations in *Inland Revenue Commissioners* v. *Eccentric Club.* (1)

The Court of Appeal (Pollock M.R., Warrington and Scrutton L.JJ.) reversed the decision of the learned judge and upheld the assessments.

The facts sufficiently appear from the judgment of the Lord Chancellor, and are summarized in the headnote.

Latter K.C. and *E. H. Tindal Atkinson* for the appellants. The appellant company is not liable to corporation profits tax, inasmuch as it does not carry on a trade or business within s. 52, sub-s. 2 (*a*), of the Finance Act, 1920, and the surplus funds are not profits to which the Act applies. A mutual insurance company does not carry on a trade, because it is merely carrying out transactions with its own members. Trading implies buying and selling. The surplus derived from contributions of the members is not profits within the meaning of the Act, but is a fund which can be applied to meet in part expenditure upon future and unascertained contingencies or to reduce future calls: *New York Life Insurance Co.* v. *Styles.* (2) That case, which was a decision upon income tax, decided two things: (1.) that the company, so far as it was a mutual insurance company, did not carry on a trade or business; (2.) that there were no profits. The Court of Appeal treated it as deciding (2.) only. The idea of carrying on a trade denotes the possibility of profit, and if

(1) [1924] 1 K. B. 390, 430. (2) 14 App. Cas. 381, 394.

from the nature of the association it is impossible to make a profit, there can be no carrying on of trade. Lord Watson expressly stated that the transactions of the company did not constitute the carrying on of a trade, and this is implied in the judgments of the other Lords who agreed with him. That was the view of Sargant L.J. in *Inland Revenue Commissioners* v. *Eccentric Club* (1), where he said that each of the majority (Lord Watson, Lord Herschell, Lord Bramwell and Lord Macnaghten) decided that in the case of a scheme for mutual insurance not only were there no profits, but there was no question of trade or business in any ordinary sense of the words: see Brett L.J.'s observations on *In re Arthur Average Association for British, Foreign and Colonial Ships* (2) in *Smith* v. *Anderson*. (3) Scrutton L.J. proceeded mainly on *In re Padstow Total Loss and Collision Assurance Association*. (4) That was a decision on the Companies Act, 1862, and the question of gains for taxing purposes was not in issue, but it has been much criticized, and unless distinguishable it is wrong. In *New York Life Insurance Co.* v. *Styles* (5) Lord Macnaghten uses the language of the Companies Act, and comes to exactly the opposite conclusion. If the appellants do not come within the area of charge in s. 52, s. 53 does not enlarge the area. Assuming that the appellants come within the Act, this surplus is not a profit. Sect. 53, sub-s. 2 (*h*), does not apply to insurance companies; it applies only to trades. In sub-s. 2 (*i*), which deals with insurance companies, the Legislature speaks of the business of insurance. Insurance is a business rather than a trade: *Edinburgh Life Assurance Co.* v. *Solicitor of Inland Revenue*. (6)

Sir Douglas Hogg A.-G. and *Reginald Hills* for the respondents were not called upon.

VISCOUNT CAVE L.C. My Lords, the question to be determined in this case is whether the appellants, the Cornish

(1) [1924] 1 K. B. 390, 430.
(2) (1875) L. R. 10 Ch. 542.
(3) (1880) 15 Ch. D. 247, 280.
(4) 20 Ch. D. 137.
(5) 14 App. Cas. 411.
(6) (1875) 2 R. 394.

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Mutual Assurance Company, Ld., have been rightly charged with corporation profits tax.

It appears from the case stated by the Commissioners for the General Purposes of the Income Tax Acts that the company is a company limited by guarantee, and was incorporated under the Companies Acts on October 10, 1903; it carries on a mutual fire insurance business in the counties of Devon and Cornwall, and has no subscribed capital. By the company's memorandum of association it is provided that the objects of the company are: (1.) "to carry on in the United Kingdom and elsewhere the business of a fire, accident, guarantee and general insurance company and insurance in all its branches (excepting the issuing of policies of assurance on human life)"; and then, after other objects have been specified, cl. 29 of the memorandum enables the company to distribute property of the company in kind among the members. Of the articles of association it is only necessary to quote a few. Art. 5 provides that: "Any person who is desirous of insuring with the company may become a member of the company subject to the provisions hereinafter contained, and no person shall be permitted to insure with the company unless he is or becomes a member thereof." Art. 6, as altered by a special resolution, provides that: "The issue to any person and the acceptance by him of a contract of insurance with the company shall constitute such person a member of the company, notwithstanding that no formal application for membership may have been made." Art. 7 provides that: "Every person who becomes a member of the company shall pay such entrance fee as the directors may determine." Art. 15 provides that: "The directors shall have power as and when they think fit to make calls on the members of any class, with a view to providing funds for the general expenses of the company, for paying claims, for creating a reserve fund and for such other purposes as, in the opinion of the directors, shall be necessary or desirable." Art. 88 provides that: "All moneys received by the company, whether for entrance fees or from any other source, and not directly applicable to the payment of claims pursuant to the regulations for the time being of

the company, shall be applicable to any of the purposes of the company as the directors may from time to time determine," and so on. Policies were issued by the company, which fixed the entrance fee payable by members at 3*s.* 6*d.* per centum on the sum as rated for contribution, and which in other respects followed the provisions of the articles of association.

It is found in the case that the interest and other income of the company arising from investments and the surplus of the company arising from transactions with members of the company for the accounting period ended June 30, 1920, amounted to 315*l.*, and for the accounting period ended September, 1921, to 3638*l.*, and upon those sums, less the statutory allowance of 500*l.*, the assessments to corporation profits tax have been made.

On these facts the question is whether the company was liable to this tax. The tax was imposed by the Finance Act, 1920, from which it is only necessary to quote a few words. Sect. 52, sub-s. 2, provides that the profits to which the tax is applicable are as follows: "(*a*) the profits of a British company carrying on any trade or business or any undertaking of a similar character, including the holding of investments." Sect. 53, sub-s. 2, provides that: "Subject to the provisions of this Act, profits shall be the profits and gains determined on the same principles as those on which the profits and gains of a trade would be determined for the purposes of Sch. D" of the Income Tax Acts, with a proviso that for the purpose of this part of this Act . . . . (*h*) "profits shall include in the case of mutual trading concerns the surplus arising from transactions with members."

My Lords, there are two questions to be considered which it is desirable to keep separate. The first question is whether the appellant company is, within the meaning of s. 52, sub-s. 2, of the Act of 1920, a company "carrying on any trade or business or any undertaking of a similar character." There is no need, I think, to refer further to these last words "or any undertaking of a similar character"; the real question is whether the company is carrying on a trade or business.

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Apart from authority, I should have had no manner of doubt upon the subject. By the memorandum of association of the company its main object is to carry on the business of fire insurance. In fact it receives from its members certain moneys, which are called entrance fees and calls, but which have a family likeness to premiums; it pays claims and it conducts the ordinary and well known business of fire insurance. It is true that it only carries on that business with its own members; but, as every person who chooses to effect a policy with the company ipso facto becomes a member, the restriction does not appear to me to prevent the transactions of the company from being business transactions. That view is supported by the case of the *Arthur Average Association* (1) and by the well known case of *In re Padstow Total Loss and Collision Assurance Association* (2); and some observations of Brett L.J. in the latter case show clearly that in his view a mutual assurance company of this kind does carry on a business. On the other hand it is suggested that some expressions used by Lord Watson in a case in this House: *New York Life Insurance Co.* v. *Styles* (3), show that in his view such a company does not carry on a trade or business at all. The point to be decided by the House in that case was whether the company there concerned was carrying on a trade from which it derived profits which were subject to tax, and the actual decision was that there were no such profits; but in the course of deciding that point Lord Watson certainly said that he could not conceive why the assurance company should be regarded as traders, and, again, that the transactions of that company, so far as they related to participating policies, did not constitute the carrying on of a trade within the meaning of the Income Tax Acts. The other noble and learned Lords who concurred in the decision did not, in my view, say anything which had that meaning; their observations were directed entirely to the question whether there were taxable profits of a trade within the meaning of the Income Tax Acts, and I do not think that they pronounced any opinion upon

(1) L. R. 10 Ch. 542. (2) 20 Ch. D. 137, 147.
(3) 14 App. Cas. 381, 394.

the different question, whether there was a trade at all. Sargant L.J. in a later case—the *Eccentric Club* case (1)—gave great weight to the expressions which I have quoted from the judgment of Lord Watson in *Styles'* case (2), which he treated as having been accepted by the other noble Lords who concurred in the decision in that case; but with great respect to the opinion of the learned Lord Justice I do not take the same view of the judgments in *New York Life Insurance Co.* v. *Styles* (2), and I think that the argument must rest entirely upon the two dicta of Lord Watson. I cannot help thinking that that very learned Lord directed his observations only to the real question before the House—namely, whether there were taxable profits within the Income Tax Acts; and I cannot believe that he intended to decide that a company of this kind, simply because it was a mutual company, did not carry on any business at all. At all events, I feel myself no doubt upon the question.

My Lords, that leads me to the second question, which is this: Admittedly this is a mutual company; and, but for the provision in s. 53, sub-s. 2, of the Finance Act of 1920, it might have been argued on the authority of *New York Life Insurance Co.* v. *Styles* (2), and of other cases that, assuming a business to be carried on, there are no profits of the business which fall within the tax, but only a surplus arising from the members' contributions. But para. (*h*) of s. 53, sub-s. 2, deals expressly with that point, because it provides that in the case of mutual trading concerns the surplus arising from transactions with members shall be treated as profits. It is suggested that the expression "mutual trading concerns" does not include a mutual assurance company; but I do not think the words ought to be so limited. I think the expression "mutual trading concerns" was intended to include all concerns, whether you call them trades or businesses, which are carried on upon the principle of mutual trading; and, in my view, a mutual insurance company like the appellant company falls within that description. It can hardly be doubted that the draftsman of the Act of 1920 had in view the decisions

(1) [1924] 1 K. B. 390, 430. (2) 14 App. Cas. 381.

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in *Styles'* case and other similar cases, and intended to meet in advance an argument that the surplus arising from members' contributions in the case of companies such as those which were in question in those cases did not fall within the term " profits " in s. 52 of the Act.

Upon the whole I think that on this point also the argument fails, and, therefore, that this appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

LORD ATKINSON. My Lords, I concur.

LORD SHAW OF DUNFERMLINE. My Lords, I also agree.

LORD SUMNER. My Lords, I agree.

LORD DARLING. My Lords, I agree.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, Jan. 21, 1926.

Solicitors for the appellants: *Sugden, Hextall & Beal, for Daniell & Thomas, Camborne.*

Solicitor for the respondents: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

HARTLAND . . . . . APPELLANT;

AND

DIGGINES . . . . . RESPONDENT.

H. L. (E.)*
1926
Jan. 22.

Revenue—Income Tax—Office or Employment—Basis of Assessment—Voluntary Payments of Income Tax on Employees' Salaries—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *Sch. E.*

A shipping company voluntarily paid income tax over a series of years on the salaries of their employees, including their accountant:—

Held, that this payment was part of the accountant's profits and emoluments as an officer of the company for which he was assessable to income tax.

North British Ry. Co. v. *Scott* [1923] A. C. 37 applied.

Decision of the Court of Appeal [1925] 1 K. B. 372 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Rowlatt J. (2) on a case stated by the Commissioners of Income Tax on public offices or employments of profit in the City of London.

The appellant, who was employed by the New Zealand Shipping Company, Ld., as their accountant at a salary of 500*l.* a year, appealed against an assessment to income tax under Sch. E for the year ending April 5, 1919, in the sum of 580*l.* 5*s.*, the 80*l.* 5*s.* representing the income tax paid by the company in respect of his salary. Since 1912 the company had paid the income tax on the salaries of all their employees including the appellant, and the amount so paid was allowed as a trade expense in arriving at the profits of the company for purposes of assessment.

The company entered into no agreement with the appellant as to the payment of income tax in respect of his salary.

The Commissioners upheld the assessment.

Rowlatt J. affirmed the determination of the Commissioners, and his decision was affirmed by the Court of Appeal (Pollock M.R., Warrington and Scrutton L.JJ.).

* *Present:* VISCOUNT CAVE L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD SUMNER, and LORD DARLING.

(1) [1925] 1 K. B. 372. (2) [1924] 2 K. B. 168.

H. L. (E.) 1926 HARTLAND v. DIGGINES.

Latter K.C. and *Edwardes Jones K.C.* for the appellant. The salary of the appellant in the year of assessment was 500*l.* and no more. The 80*l.* 5*s.* was not in fact part of his salary nor was it received by him or paid on his behalf. It formed no part of his emolument under Sch. E in s. 146 of the Income Tax Act, 1842. *North British Ry. Co.* v. *Scott* (1) is distinguishable, because the payment was made in virtue of a contract with the employee, and not as in this case voluntarily. The Easter offering cases, such as *Blakiston* v. *Cooper* (2), are also distinguishable, because there the payment was made to the holder of the office. It is not every advantage which an employee gets by reason of his employment, which is a taxable profit: *Tennant* v. *Smith.* (3) The dividends cases are also distinguishable, because there is no question of the assessment of the shareholders.

[They referred to *Samuel* v. *Inland Revenue Commissioners* (4); *Purdie* v. *The King* (5); *Inland Revenue Commissioners* v. *Blott.* (6)]

Sir Douglas Hogg A.-G., *Sir Thomas Inskip S.-G.* and *Reginald Hills* for the respondent were not called on.

VISCOUNT CAVE L.C. My Lords, at first sight this appeal seemed to involve questions of a merely technical character and of trifling importance, and I confess that I was surprised that on a dispute involving a liability of something less than 20*l.* the appellant should not have been content with the decision of the High Court and of the Court of Appeal; but we are now informed that the appeal is a test case, and that possibly explains the matter. In any case it is necessary to deal with the points that have been raised.

My Lords, the facts are found in the case stated by the Commissioners. It appears that the appellant was throughout the year of assessment in the employ of a shipping company as their accountant, and that his salary was 500*l.* a year, but that it had been the custom of the company since 1912 to

(1) [1923] A. C. 37.
(2) [1909] A. C. 104.
(3) [1892] A. C. 150.
(4) [1918] 2 K. B. 553.
(5) [1914] 3 K. B. 112.
(6) [1921] 2 A. C. 171, 201.

pay every year the income tax in respect of the salaries of all its employees, including the appellant, and that the amount so paid in respect of the appellant's salary for the year preceding the year of assessment was 80*l.* 5*s.* The company had entered into no agreement, either verbal or in writing, to pay income tax on the appellant's salary, but in fact it had been paid year after year since the year 1912. On those facts the appellant was assessed to income tax under Sch. E for the year ending in April, 1918, on a sum of 580*l.* 5*s.*, being the 500*l.*, his regular salary, plus the 80*l.* 5*s.*, representing the year's payment for income tax, and to that assessment he objects. No question is raised as to figures.

My Lords, the Income Tax Act provides that the duty under Sch. E is to be payable "for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of" the office held by the person to be charged; and by r. 4 in Sch. E "perquisites" are to be deemed to be "such profits of offices and employments as arise from fees or other emoluments." The question therefore is whether the additional 80*l.* 5*s.* comes within the description of "profits," "perquisites," or "emoluments" in that statute. If it does come within that description, it is plain that it is rightly added to the salary for the purpose of assessment. That appears from the case of *Samuel* v. *Inland Revenue Commissioners* (1) relating to super tax, and the case of *North British Ry. Co.* v. *Scott* (2), and from other decisions.

But is it a profit, a perquisite, or an emolument? That the payment is voluntary makes no difference; that appears plainly from the case of *Blakiston* v. *Cooper*. (3) But it is said—and this is the main argument used on behalf of the appellant—that the sum is not an emolument, because it was not paid to the appellant or at his request, although in fact it was paid regularly over a series of years. I do not agree with that argument. There was that continuity in payment to which reference was made in the case of *Blakiston* v. *Cooper* (3), and the effect of the payment was in practice

(1) [1918] 2 K. B. 553. (2) [1923] A. C. 37.
(3) [1909] 1 A. C. 104.

H. L. (E.) 1926 HARTLAND v. DIGGINES. Viscount Cave L.C.

and in fact to relieve the appellant year after year from his liability for the payment of the tax. It is true that the appellant did not receive cash in his hands, but he received money's worth year after year. This being so, I cannot resist the conclusion that the payment was in fact a part of his profits and emoluments as an officer of the company for which he has been properly assessed to tax.

For these reasons I move your Lordships that this appeal be dismissed with costs.

LORD ATKINSON. My Lords, I agree.

LORD SHAW OF DUNFERMLINE. My Lords, after reading the judgment of the learned Master of the Rolls I felt that the case of the appellant was a hopeless case. I agree with that judgment, and also with the judgment which your Lordship has just delivered.

LORD SUMNER. My Lords, I agree.

LORD DARLING. My Lords, I agree.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, Jan. 22, 1926.

Solicitors for the appellant: *Thomas Eggar & Son.*
Solicitor for the respondent: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

WHELAN . . . . . APPELLANT; H. L. (E.)* 1926 Jan. 26.

AND

HENNING . . . . . RESPONDENT.

Revenue—Income Tax—Foreign Possessions—"Income"—"Source of Income"—Assessment—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *First Schedule, Sch. D, Case V., r.* 1.

Under Case V. of Sch. D of the Income Tax Act, 1918. which provides that tax shall be charged in respect of income arising from foreign possessions, the receipt of income in the year of assessment is a condition precedent to liability to income tax.

Brown v. *National Provident Institution* [1921] 2 A. C. 222 applied.

Where therefore the holder of shares in a foreign company, from which he had received dividends for several years but received no dividends in the year of assessment, was assessed to income tax under Case V. of Sch. D on the average dividends received by him in the three preceding years :—

Held, that the assessment was bad and that he was not liable to income tax under Case V.

Decision of the Court of Appeal [1925] 1 K. B. 387 affirmed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Rowlatt J. (2) upon a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the division of Dorchester. The respondent, who resided in the United Kingdom, was the holder of 1000 shares of Rs.100 each in the Vincit Tea and Rubber Co., Ld., incorporated in Ceylon. Until the income tax year 1920–21 he had received substantial dividends therefrom. On July 22, 1920, he made a return in the sum of 3424*l.* for the year ending April 5, 1921, being the average of the dividends received by him in the three preceding years, and an assessment was made upon him in that amount for the year in question. In the year 1920 the company declared no dividend and consequently no income was remitted to the respondent during the tax year ending April 5, 1921. The respondent subsequently made an amended return showing

* *Present:* VISCOUNT CAVE L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD SUMNER, and LORD CARSON.

(1) [1925] 1 K. B. 387. (2) [1924] 2 K. B. 421.

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no income under Sch. D, but no alteration was made in the assessment.

The respondent appealed to the General Commissioners, who discharged the assessment.

Rowlatt J. affirmed the determination of the Commissioners on the authority of *Brown* v. *National Provident Institution* (1), and his decision was affirmed by the Court of Appeal (Pollock M.R., Warrington and Scrutton L.JJ.).

1926. Jan. 25, 26. *Sir Douglas Hogg A.-G.* and *Sir Thomas Inskip S.-G.* (with them *Reginald Hills*) for the appellant. Income tax is a charge on persons who own particular named sources of income. The charge is calculated at a specified rate on the profits accruing to that person from the particular source computed in the manner laid down in the Act itself. A source of income is that which is so described in the Act itself; it is anything which is named in the Act as attracting income. The provisions of the Act are inconsistent with the view that the making of profits in the year of assessment is a condition precedent to liability to assessment. The income which is taxed is a statutory or conventional income and not the actual income. It is to be estimated in accordance with the provisions of the Act, i.e., in the present case on the three years' average. In order to enable income tax to be levied so far as possible in the course of the financial year the Income Tax Acts provide, where necessary, that the income to be charged shall be estimated without reference to the amount arising in the course of the year of charge, which cannot ordinarily be ascertained until the end of the year, and with reference only to the amount arising in one or more preceding years, and the claim of the respondent would make that scheme unworkable. This case is not concluded by *Brown* v. *National Provident Institution* (2), because there the source of income had ceased to exist, whereas here the source of income, i.e., the holding of the shares, still exists. That was

(1) [1921] 2 A. C. 222.
(2) [1921] 2 A. C. 222, 232, 237, 238, 242; [1920] 3 K. B. 35, 56.

a case under Case III., and in that particular case it was unimportant to distinguish between the source and the income, because the discounts there were both the source and the income. This has led to some confusion of language in the judgments, but Viscount Haldane formulates the question to be decided quite accurately—namely, whether the source of the profits and gains must be one which continued to exist in the year of assessment, and Warrington L.J. in the Court below said that the scheme of the Income Tax Acts was that the tax was payable " in respect of a source of income existing in the year of assessment."

[They also referred to *Burntisland Shipbuilding Co.* v. *Inland Revenue* (1); *Great Western Ry. Co.* v. *Bater* (2); *Yuanmi Gold Mines* v. *Eborall* (3); and to the Income Tax Acts of 1799, 1803, and 1842.]

Goddard K.C. and *Guy Welsford* for the respondent. This case is completely covered by *Brown* v. *National Provident Institution* (4), and there is no foundation for the suggested distinction. That case decided under Case III. that the possession of income in the year of assessment was a condition precedent to the liability to tax. The tax under Case V. is in respect of income arising from possessions out of the United Kingdom; it has nothing to do with sources of income. The object of introducing the word " sources " into the Act is for the purpose of assessment and collection, not for the purpose of charging. Rule 1 of Case V. only provides the method for computing the amount of the taxable income where there is an actual income. Further, the holding of shares which yield no income is not a source of income in the year of assessment; it is at most a potential source of income.

Sir Thomas Inskip S.-G. replied.

VISCOUNT CAVE L.C. My Lords, the respondent, Captain Henning, holds some shares in a foreign company, which in the three financial years ending on April 5, 1918,

(1) 1923 S. C. 449.
(2) [1922] 2 A. C. 1, 30.
(3) [1921] 2 K. B. 544.
(4) [1921] 2 A. C. 222.

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1919 and 1920, produced substantial dividends, but in the financial year ending on April 5, 1921, produced no dividend. He was assessed to income tax under Case V., Sch. D, of the Income Tax Act, 1918, in respect of the fourth of those years —namely, the year ending April 5, 1921. The question is whether he was properly so assessed or whether, having received no profits from the shares in the year of assessment, he was exempt from assessment in respect of those shares.

My Lords, a similar question arising under Case III. of Sch. D was decided by this House in favour of the taxpayer in the case of *Brown* v. *National Provident Institution*. (1) It has been held by Rowlatt J. and by the Court of Appeal that the present case is governed by that decision. After carefully considering the enactments and rules relating to Case V. of Sch. D, and comparing them with those relating to Case III. of the same Schedule, I am unable to find any difference which prevents the case cited from being applicable in equal measure to Case V. The Attorney-General and the Solicitor-General have laid stress on certain references in the Act of 1842 and in the Act of 1918 to " sources of income " and have contended that this case is distinguishable from *Brown's* case, on the ground that in *Brown's* case no continuing source of income was vested in the taxpayer, whereas in the present case the shares formed a continuing source, or at all events a potential source, of income in respect of which an assessment could be made. Your Lordships have heard the judgments in *Brown's* case read, and it does not appear to me that the judgments of the majority of the House in *Brown's* case left the door open for any such distinction. Those judgments proceeded on the broad principle that the tax under Case III. was a tax on the profits of the year of assessment measured by, but not grounded on, the figures of the preceding year, and accordingly that where there were no such profits there was nothing to which the tax could attach. That principle, which must of course be accepted as declaring the law, applies equally to Case V., with the substitution for the preceding year of the average

(1) [1921] 2 A. C. 222.

of the three preceding years; and it is conclusive of the present case. Such differences as there are between the language of the Acts of 1842 and 1853, which governed *Brown's* case, and that of the Act of 1918, which governs the present case, are in favour of and not adverse to the application of the principle to the case now under appeal; for, whereas in the Act of 1842 the tax under Case V. was described as a duty to be charged "in respect of foreign possessions," in the Act of 1918 it is referred to as a tax "in respect of the income arising from foreign possessions." I think that *Brown's* case is fatal to this appeal.

It is only necessary to add that for myself I desire to confine my decision to cases arising under Case V. of Sch. D. The question whether the same conclusions apply to Case I. of Sch. D is not before your Lordships, and I express no opinion upon it.

For the reasons which I have given I am of opinion that this appeal must fail, and I move your Lordships that it be dismissed with costs.

LORD ATKINSON. My Lords, I agree.

LORD SHAW OF DUNFERMLINE. My Lords, in the case of *Brown* v. *The National Provident Institution* (1) the noble Viscount, Lord Haldane, stated the basic principle at the end of his decision, and of the decision, as I think, of this House in the following language: "The tax is intended as matter of basic principle to be on profits and gains forming income in the year of assessment, though not measured by the income of that year . . . . the tax is imposed only where there are profits and gains arising within the year of assessment." I do not feel myself at liberty, therefore, to give effect to any of the arguments so carefully presented on behalf of the Crown in this appeal. I think *Brown's* case covers the present.

LORD SUMNER. My Lords, I agree. It is always undesirable to refine upon prior decisions of this House in order to introduce

(1) [1921] 2 A. C. 222, 236.

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distinctions without differences, and especially is it so in tax cases. After prolonged re-examination of *Brown's* case I think the ratio decidendi of the judgments of the majority of the noble and learned Lords was one equally applicable to the present case and equally decisive against the imposition of tax.

I should not desire it to be supposed that it is only upon the previous decision of *Brown's* case that this conclusion is arrived at, or that I have any doubt as to the meaning and effect of the Act of 1918 under which the present case arises. I have carefully considered all the relevant sections, with all the assistance that the law officers of the Crown have been able to give us, and I am of opinion that they contain no adequate or appropriate words of charge so as to make the respondent liable to tax in this case.

LORD CARSON. My Lords, I agree.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, Jan. 26, 1926.

Solicitor for the appellant: *Solicitor of Inland Revenue.*

Solicitors for the respondent: *Taylor & Humbert, for Lock, Reed & Lock, Dorchester.*

[PRIVY COUNCIL.]

CITY OF MONTREAL . . . . . APPELLANTS;

AND

HARBOUR COMMISSIONERS OF MONTREAL . . . . . RESPONDENTS.

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Nov. 10.

TETREAULT (SINCE DECEASED) . . . APPELLANT;

AND

HARBOUR COMMISSIONERS OF MONTREAL . . . . . RESPONDENTS.

ATTORNEY-GENERAL FOR QUEBEC . APPELLANT;

AND

ATTORNEY-GENERAL FOR CANADA . RESPONDENT.

[CONSOLIDATED APPEALS.]

ON APPEAL FROM THE COURT OF KING'S BENCH FOR QUEBEC, APPEAL SIDE.

Canada (Quebec)—Public Harbour—Extension of Montreal Harbour—Ownership of Foreshore and Bed of River—Dominion legislative Power—"Navigation and shipping"—Riparian Owner—Right of Access to River—Possessory Action—Civil Code of Procedure, art. 1064—*British North America Act,* 1867 (30 *&* 31 *Vict. c.* 3), *s.* 91, *head* 10; *ss.* 108, 109.

A Dominion statute of 1873 extended the limits of Montreal harbour, and a Dominion statute of 1894 purported to vest the land within the extended limits in the Montreal Harbour Commissioners. In 1914 a further Dominion statute purported to vest the harbour as extended in the Crown in the right of the Dominion, subject to the Commissioners' powers of management. The Commissioners built an embankment, and carried out other works on the foreshore of the river St. Lawrence within the limits of the harbour as extended. In consequence the City of Montreal had to divert a sewer which had carried sewage over their riparian land into the river. The City sued the Commissioners to recover the expense of the diversion:—

Held, (1.) that the effect of ss. 108 and 109 of the British North America Act, 1867, was to vest the harbour, as it existed at that date,

* *Present:* VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD SHAW, LORD CARSON, and MR. JUSTICE DUFF.

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in the Crown in the right of the Dominion; but, except in that respect, to vest the bed and foreshore in the Crown in the right of the Province.

(2.) That the Dominion statute of 1873 did not enlarge the proprietary rights of the Dominion, nor enable the Dominion Legislature to take land for harbour purposes without paying compensation; if the later Dominion statutes purported to do so, they were ultra vires.

(3.) That the power of the Dominion Legislature under s. 91, head 10, of the British North America Act, 1867, to make laws as to "navigation and shipping" did not empower it to authorize the Commissioners to carry out the extensive works which were complained of, but that the Province had waived its rights and sanctioned the works.

(4.) That the City as riparian owners had not a right to discharge sewage into the river; their right to do so rested on a licence from the Provincial authorities, and that licence had been made subsidiary to the proceedings of the Harbour Commissioners; and that accordingly, the action by the City should be dismissed.

Judgment of the Court of King's Bench varied.

Further, a riparian proprietor brought against the Harbour Commissioners a possessory action for damages based upon art. 1064 of the Civil Code of Procedure of Quebec. He claimed that, as a servitude attached to his riparian land ex jure naturae, he had a right of access to, and egress from, the river, and that the works above mentioned deprived him of the exercise of those rights. The St. Lawrence at Montreal is navigable but not tidal.

Held, that the plaintiff, as a riparian proprietor, had the rights which he claimed, and that he was entitled to recover damages by means of a possessory action under art. 1064. The right claimed was not affected by the fact that the grant of the land to the plaintiff's predecessors reserved a royal highway between the land and the river.

North Shore Ry. Co. v. *Pion* (1889) 14 App. Cas. 612 applied.

Judgment of the Court of King's Bench reversed.

CONSOLIDATED APPEALS (Nos. 185 and 186 of 1924) from a judgment of the Court of King's Bench for Quebec, Appeal Side (May 14, 1924), affirming, with modifications, a judgment of the Superior Court (December 22, 1921).

The two consolidated appeals, which were heard together, arose out of two actions brought in the Superior Court of the Province of Quebec against the Harbour Commissioners of Montreal in consequence of extensive works carried out by the Harbour Commissioners upon the foreshore and bed of the river St. Lawrence in connection with an extension of Montreal Harbour. One action (to which appeal No. 186 related) was brought by the City of Montreal to recover as damages the expense of diverting a sewer. The other action

(to which appeal No. 185 related) was brought by Tetreault, a riparian proprietor, to recover, by a possessory action based upon art. 1064 of the Civil Code of Procedure, damages for a disturbance of the right of access to and egress from the river, which he claimed as a servitude. The Attorney-General for Canada and for the Province of Quebec intervened in both actions.

The facts giving rise to the litigation appear fully from the judgment of the Judicial Committee.

The Superior Court dismissed both actions. Appeals to the Court of King's Bench were dismissed, subject to variations made upon appeals by the Attorney-General for Quebec. The judgment on appeal is reported at Q. R. 37 K. B. 420, and the effect of the judgments in both actions is stated in the judgment of the Judicial Committee.

1925. July 10, 13, 14, 16, 17. *Sir John Simon K.C.*, *Attwater K.C.* and *Hon. Geoffrey Lawrence K.C.* for the appellant City.

St. Germain K.C. for the appellant Tetreault.

Sir John Simon K.C., *Lanctot K.C.* (*A.-G. for Quebec*), *Hon. Geoffrey Lawrence K.C.* and *M. Alexander* for the Attorney-General for Quebec.

The foreshore and bed of the river at the locality in question are the property of the King in the right of the Province. The " public harbours " assigned to the Dominion by s. 108 and Sch. 3 of the British North America Act, 1867, are public harbours as existing at that date: *Attorney-General for Canada* v. *Ritchie Contracting Co.* (1) The Dominion statutes under which the works were executed, upon their construction, do not alter the ownership, nor do they purport to authorize the Commissioners to acquire land without paying compensation; s. 34 of the consolidating Act of 1894 enables the Commissioners to expropriate land upon payment of compensation. If the statutes in question purport to deprive the Province of its property they are ultra vires under ss. 91 and 92 of the British North America Act, 1867. The power of the

(1) [1919] A. C. 999, 1004.

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Dominion Legislature under s. 91, head 10, as to "navigation and shipping," even if applicable, cannot be exercised so as to deprive the Province of its proprietary rights, though the exercise of the power may lawfully interfere to some extent with those rights: *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1); *Attorney-General for Canada* v. *Attorney-General for Quebec.* (2) The Legislature of the Province, exercising its powers under s. 92, head 13, had enacted by art. 407 of the Civil Code that nobody should be deprived of his property for a public purpose save upon payment of a just indemnity. The appellants as riparian owners had a right of access to the river: *North Shore Ry. Co.* v. *Pion.* (3) The judgment appealed from was contradictory in declaring that the property was vested in the Province, but that the Dominion had a perpetual right of user; the proprietary right, whether of the Dominion or of the Province, was only a right of beneficial user, the property being vested in the Crown: *St. Catherine's Milling Co.* v. *The Queen.* (4) The decision in *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (5) does not affect this case. It turned on its special facts; the land there in question was the property of the Dominion, and the works were carried out under an Order in Council which, under s. 146 of the Act of 1867, had the effect of an Imperial statute.

Lafleur K.C. for the Attorney-General for Canada. The statutes under which the Commissioners acted were intra vires of the Dominion. The Dominion had power to do everything necessary for the effectual exercise of its powers under s. 91, heads 9 and 10, s. 92, head 10, and having regard to s. 146. That power included the right to appropriate public or private property where necessary; the right to receive compensation depended solely upon the Dominion statute exercising the power: *Montreal Corporation* v. *Drummond* (6); *Toronto Corporation* v. *Bell Telephone Co. of Canada* (7); *Attorney-General for British Columbia* v. *Canadian*

(1) [1914] A. C. 153, 172.
(2) [1921] 1 A. C. 413, 419.
(3) 14 App. Cas. 612.
(4) (1888) 14 App. Cas. 46.
(5) [1906] A. C. 204.
(6) (1874) 1 App. Cas. 384.
(7) [1905] A. C. 52.

Pacific Ry. Co. (1) The last case cited cannot be distinguished from this case. The decisions of the Board as to fisheries are not applicable. The legislative powers given to the Dominions override the Provincial powers, and may be exercised so as to infringe upon Provincial rights.

Geoffrion K.C. and *Meredith K.C.* for the respondent Commissioners. The Acts were intra vires, but that question does not really arise, as the actions were not maintainable. The municipal right of drainage was by licence from the Province, and has always been subject to the extension of the harbour; that position has been recognized by the Legislature of Quebec and by judicial decisions, and was accepted by the municipality. The plaintiffs' rights as riparian owners did not give them the rights they claimed in the actions. The principle of *North Shore Ry. Co.* v. *Pion* (2) should not be extended to non-tidal waters. [On the question of the right of access reference was made also to *Bell* v. *Quebec Corporation* (3); *Chaurest* v. *Pilon* (4); and Civil Code, art. 503.] The action by Tetreault was a possessory action, and that form of action did not lie, for the reasons pointed out in the judgment appealed from.

Sir John Simon K.C. in reply referred to *Ontario Mining Co.* v. *Seybold* (5); *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (1); *Canadian Pacific Ry. Co.* v. *Toronto Corporation* (6); *Attorney-General* v. *De Keyser's Royal Hotel* (7); and to the Interpretation Act (R. S. Can., 1906, c. 1), s. 16.

St. Germain K.C. replied for the appellant Tetreault.

Nov. 10. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. These appeals were heard together. There are questions of law which are common to both, as well as issues of fact which present some analogies. It will be convenient to deal with the appeal of the City of Montreal n the first place, in a judgment which will extend to both

(1) [1906] A. C. 204.
(2) 14 App. Cas. 612.
(3) (1879) 5 App. Cas. 84.
(4) (1908) Q. R. 17 K. B. 283.
(5) [1903] A. C. 73, 79.
(6) [1911] A. C. 461, 477.
(7) [1920] A. C. 508, 525.

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appeals, but will be based on certain considerations which are materially different in the two cases.

The appeal of the City of Montreal is brought from a judgment of the Court of King's Bench of the Province of Quebec, which dismissed an appeal by the City from a judgment of the Superior Court, refusing its claim for a sum of $110,086.50, with interest and costs. The question disposed of related to the right of the City to recover from the Harbour Commissioners the expense it had incurred in changing the outlet of a sewer into the river St. Lawrence, an expense said to have been caused by the unlawful action of the Commissioners in erecting certain works on the bed and foreshore of the river, and the further expenses incurred as extras, due to alterations insisted on in the construction of the sewer by the Commissioners during the progress of the work done.

The questions of law which arose related, in part at least, to the effect of certain Dominion statutes purporting to vest the control of the Harbour of Montreal, as it has grown to be, in the Commissioners, and to extend the limits of the harbour so as to include the site on which the works in question are built. It was the questions of law so raised that occasioned the intervention of the two Attorneys-General. The judgments affirmed the substantial operation of the legislation of the Dominion Parliament, but it was held that this did not have the effect of vesting the property in the solum in the Crown in right of the Dominion Government.

In 1898 one Viau built in its first form the sewer already referred to on his own land, in accordance with a general drainage scheme approved by the town of Maisonneuve, in which it was situated. The sewer was cylindrical, and was made of brick with a diameter of about four feet. It ran along the line of a street called First Avenue into the deep water of the river. Maisonneuve was a town on the island of Montreal adjoining the city in the downstream direction. After the present litigation was commenced this town was incorporated with the City of Montreal, which was thereupon substituted as plaintiff in this action.

The respondents are a corporation which at the time of confederation had control of the Harbour of Montreal, and the harbour as it then stood became, under the provisions of the British North America Act, the property of the Crown in right of the Dominion. At the date of confederation the harbour terminated on the north side of the river at the point where a stream called the Ruisseau Migeon discharges into the St. Lawrence, and did not include the land beyond and lower down in question in this litigation. By 1901 Viau had parted with his sewer and the site of the street called First Avenue, and they have become the property of the City. The sewer has since then been connected with other sewers and drains under the control of the City.

In 1873 a Dominion statute of that year purported to extend the limits of the harbour down the river from Ruisseau Migeon to a point opposite the church of the parish of Longue Pointe, following the river along the high water mark and including the beach. In 1894 a later Dominion statute confirmed the boundaries as already established, and purported to vest the land within them in the Commissioners. By a Dominion statute of 1909 the harbour was vested in the Commissioners as a corporation. In 1914 a further Dominion statute provided that, notwithstanding previous statutes, the harbour, with all that belonged to it, were, subject to the jurisdiction and powers of management of the Commissioners, the harbour authority, vested in the Crown in right of the Dominion.

In 1905 the Commissioners commenced building an embankment along the foreshore of the river, in front of the land, to which the City derived title through Viau. The objects included the construction of a railway along the foreshore for the purpose of facilitating the use of the harbour. The Commissioners intimated to the Maisonneuve authority that if it wished to carry any drains or sewers through this embankment, it should apply at once to the Commissioners, so that arrangements might be made for the carrying out by it of the works required. The authority replied that it would be willing to extend the sewer in question in these

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proceedings to the line of the railway, but under reservation of all its rights to extend its sewers beyond that line if it required to do so. It was resolved that the Mayor of Maisonneuve should enter into a written agreement dealing with the matter. However, in the end no such agreement was come to, and no alteration or extension by the town was found necessary for the sewers at any time between 1908 and 1911.

In 1910 the Harbour Commissioners entered into a contract with Vickers Sons & Maxim, Ld., for the construction in the locality in question of a floating dry dock and ship repairing plant. In pursuance of this contract, the harbour authority commenced operations within the limits assigned to them on the foreshore of the river, which included the laying down of lines of railway and the construction of quays. These were said to have resulted in the removal of gravel and soil from the bed, which were heaped up, with the consequence that the sewer became useless.

In 1910 the town of Maisonneuve commenced proceedings for an interlocutory injunction to restrain the harbour authorities from the further construction, within their territorial limits, of works on the foreshore and bed of the St. Lawrence opposite First Avenue (already referred to). The answer made by the harbour authorities was that what they were doing was within their powers, and that the town of Maisonneuve had no title to send its sewage into the navigable waters of the river, but that the harbour authorities had always been willing to let the town extend its sewers at its own expense, and that, without prejudice to their rights, the harbour authorities were willing to give facilities for the extension of the sewers through the harbour works, provided the plans were approved. The injunction was refused by the Superior Court, and this refusal was confirmed by the Court of Appeal.

In 1911 the Legislature of the Province of Quebec passed a statute giving authority, so far as the rights of the Province in the river and its banks were concerned, for the extension of the sewer. The Municipal Council of Maisonneuve was

thereby authorized to make any arrangements with the Harbour Commissioners respecting sewers emptying into the river which it might consider to be in its interest, and to execute the necessary works. It was authorized to build or prolong the extension of the main sewer of First Avenue into the river through the jetty or graving dock which the Harbour Commissioners were building in front of First Avenue. To ensure the efficacy of the sewerage system, built by the town under the authority of its charter and the amendments of it, the town might, as in the past, empty its sewers into the river. The section conferring these powers was, however, not to affect the rights, privileges, and powers of the Harbour Commissioners.

There followed negotiations between the town and the Commissioners, which did not result in any agreement. The town in particular refused to defray its own costs of the works required. Plans were, however, prepared by the town which, in their general features, the Commissioners expressed themselves as prepared to accept, but only if certain permissions were asked from them and a definite agreement come to. These things did not happen. In the end the town entered on its own account into a contract with the Harris Construction Company for the extension of the sewer for a sum of $64,290.00. Work was commenced under this contract. Before long the Harbour Commissioners objected that the sewer was being laid inside the harbour boundaries, and insisted on its being removed outside.

In 1912 the town of Maisonneuve commenced an action against the Commissioners for $64,290.00 as damages caused by the Commissioners in wrongly depriving the town of its right of access to the river. The Commissioners answered, among other things, that the boundaries between the harbour and the property of Viau, the predecessor in title of the town, had been fixed in 1887, and that the town had no right to carry its drains into the river through the land of the harbour authorities. Before the action proceeded to judgment, the town was by a statute annexed to and incorporated with the City of Montreal.

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The City adopted the action, and was substituted in it as plaintiff instead of the town. It claimed further damages, amounting to $45,196.50, for additional expenditure caused by the unlawful action of the harbour authority in interfering with the construction of the sewer. It denied that the Dominion statutes, relied on by the harbour authority as extending the limits of the harbour beyond those in existence at the passing of the British North America Act in 1867, and affecting property rights in the extended harbour, had the effect of vesting the solum in the harbour authority, and claimed that, so far as these statutes purported to do so, they were invalid. Thereupon the Attorneys-General for the Province and for the Dominion intervened in the proceedings.

The action came on for hearing in the Superior Court of the Province. Evidence was called on both sides, and in December, 1921, Lafontaine J. gave judgment. The judgment of the Superior Court dismissed the whole of the claims of the City of Montreal with costs, as also the claim of the Attorney-General of the Province of Quebec. The intervention of the Attorney-General of the Dominion was allowed with costs. The reasons for his judgment given by Lafontaine J. were: (1.) that the boundaries fixed by the Provincial Legislature for the City as a Municipal Corporation gave it no proprietary rights, and in particular did not vest in the City any property in the bed or foreshore of the river; (2.) that power was given to the Dominion Parliament by the British North America Act to legislate as to harbours and navigation, and that the only part of the Dominion statutes which could be challenged was the vesting of the land of the Province in the Dominion Government when the harbour was extended, but that as against the City the Harbour Commissioners had been in possession for many years before the City; (3.) that the banks and bed of the river at the place in controversy were within the harbour, and were public property, and that it was no concern of the City whether the title was in the Dominion or the Province; (4.) that the City had no right to carry its sewers into the

harbour quite apart from the question of property; (5.) that the material part of the river bank was, at the time when the sewers were carried through it, in the lawful possession of the Commissioners with the implied assent of the Province, and the works complained of were made within the boundaries fixed between the Commissioners and the town of Maisonneuve, so that the Commissioners were within their rights in requiring the City to modify its plans; (6.) without pronouncing on the legality of the Dominion statutes extending the harbour, the intervention of the Attorney-General for the Province was not justified, as the City failed on the other points.

The City and the Attorney-General for the Province then appealed to the Court of King's Bench of Quebec. Judgment was given in this appeal on May 14, 1924, by Flynn, Tellier, Bernier, Letourneau and Hall JJ. The appeal of the City of Montreal was dismissed. As regards the appeal of the Attorney-General of the Province the Court allowed the appeal to the extent of holding that the bed of the river and the foreshore at the place in question were vested in the Province, but that the Dominion statutes relating to the harbour were not ultra vires, because on their true construction they did not of necessity imply any vesting of the property in the Crown in right of the Dominion, but only controlled its use for the purposes of a harbour, which control included the right to erect all necessary structures. Flynn J., however, went further, and thought that the statutes in question were in part ultra vires. The Attorney-General for the Dominion was ordered to pay the costs of the Attorney-General for the Province.

In the "considérants" on which these judgments are founded, it is laid down that the works in controversy have been made on the banks and bed of the river, that they are part of the harbour, and that all that was done in executing them was done by the authority of the Government of the Dominion or under laws passed by its Parliament. The considérants go on to state the extension of the harbour beyond the Ruisseau Migeon down to the church of

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Longue-Pointe, so that the extended harbour comprised the whole of the bank adjoining the town of Maisonneuve. They state, further, that the banks and bed of the river belong to the Province of Quebec, but that the Dominion Government has the right, when it is constituting or extending a harbour, to make use of the banks and bed without the consent of the Province, and to execute the works which it thinks necessary. Against the harbour authority, which had got these rights, the town of Maisonneuve could not expect to enter on its own works without being interfered with by the authority as the harbour progressed, and the town could certainly acquire no rights inconsistent with those of the authority. The considérants went on to advert to the Provincial Act of 1911, already referred to, and to say that the only authority granted to the town by the Legislature of the Province was in terms subordinated to the rights of the harbour authority. This was a reason why the authority could not be held responsible for the expenses incurred by the City. It was quite true that the Attorney-General for the Province was justified in claiming the property of the banks and bed, and if the Dominion had really set up a title under its statutes to the property in these, the Court would have been unanimously adverse to the validity of the statutes, but, with the exception of Flynn J., the members of the Court were of opinion that no such claim was made in the legislation in question. Although Flynn J. took a different view from his colleagues on the question of ultra vires, he concurred in the result of the judgment. In his opinion, the City had the right to drain into the river if it could do so without committing a nuisance, but if, owing to works lawfully constructed, it could not avoid committing a nuisance, it must seek access to the river elsewhere. When the City applied to the harbour authority in 1911 and altered the projected course of its proposed sewer in response to the objection of the latter, he thought that it had waived any rights it had. Nor was it clear that even if its rights remained there was any ground, either in contract or in tort, on which it could claim the expenses incurred. His view as to ultra

vires did not affect these questions, which depended on the regulative power of the Commissioners.

Their Lordships think that it will be convenient to advert in the first place to the relevant powers of the Dominion Parliament and executive under the British North America Act. Sect. 109 enacts, among other things, that all lands belonging to the old Province of Canada at the Union are to belong to the Provinces of Ontario and Quebec in which the same are situated. But this section is qualified by the immediately preceding s. 108, which provides that the public works and property of such Province enumerated in the third schedule to the Act are to be the property of Canada. The third schedule includes public harbours, piers and river improvements. It has been settled by decisions of this Board that the words " public harbours " include only public harbours as they existed and stood at the date of confederation, unless in the case of new Provinces incorporated subsequently, a case which does not arise here. These sections are concerned with proprietary rights, and while treating all property as vested in the Crown, determine whether it is so vested in right of the Province or of the Dominion; but there are other provisions in the British North America Act which deal, not with the ownership of property, but with the power to regulate by legislation the user of property, and these are important in the consideration of the present case. Under s. 91 exclusive legislative authority is given to the Dominion Parliament in the matters of navigation and shipping. Under s. 92, head 10, lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting a Province with any other Province, or extending beyond the limits of a Province, lines of steamships between a Province and any British or foreign country, and such works as although wholly within a Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more Provinces, are all taken out of the legislative authority of the Provinces and placed (by s. 91, head 29) exclusively under that of the Dominion Parliament.

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It is not open to the Attorney-General for the Dominion in the case before their Lordships to invoke the authority given by s. 92, head 10, to the Dominion Parliament to declare any works to be for the general advantage of Canada, for no such declaration has been made as to the works now in question; and the decision must depend on the other sections quoted and on the facts of the case. In their Lordships' opinion the effect of ss. 108 and 109 of the Act of 1867 was to vest Montreal Harbour as it then existed in the Crown in right of the Dominion, but except in that respect to vest the bed and foreshore of the St. Lawrence in front of Montreal and Maisonneuve in the Crown in right of the Province of Quebec. The Dominion statute of 1873, while it was effective to extend the harbour as a harbour and to vest in the Dominion Parliament and in the Harbour Commissioners the right to make due provision for the control and protection of shipping in the harbour as extended, did not enlarge the property rights of the Dominion or enable the Dominion Parliament to take land for harbour purposes without compensation; and if and so far as the Dominion statutes of 1894, 1909 and 1914 purported to vest in the Commissioners or in the Crown in right of the Dominion the solum of the extended harbour, those statutes were in excess of the powers of the Dominion Parliament.

But the question remains whether s. 91, head 10, of the Act, which empowered the Dominion Parliament to legislate as to navigation and shipping, empowered that Parliament to authorize the extensive works undertaken by the Commissioners on the banks and foreshore and in the bed of the river. In considering this question it is necessary to bear in mind the nature of those works. They include, not only dredging operations, but an embankment and railway on the shore of the river, quays, a dry dock and ship repairing plant, and it would appear to be impossible that works of this character and extent could be constructed and used without an exclusive occupation of the soil equivalent to possession. Now there is no doubt that the power to control navigation and shipping conferred on the Dominion by s. 91 is to be

widely construed. As was pointed out by Lord Herschell in the judgment which he delivered on behalf of the Board in *Attorney-General for the Dominion* v. *Attorney-General for the Provinces* (1)—namely, the first of the three *Fisheries* cases—the terms on which those powers are given are so wide as to be capable of allowing the Dominion Parliament to restrict very seriously the exercise of proprietary rights in a fashion which, to a great extent, depends on the discretion of that Parliament. What was said in that case about the enactment of regulations and restrictions in matters relating to fisheries being excluded from the competence of the Provincial Legislatures applies not less to matters relating to navigation and shipping. But while this is so, it does not appear to their Lordships that the right of the Dominion extends so as to authorize them to vest in a body like the Commissioners an exclusive right to occupy property of the Province without compensation and to erect upon it permanent works, such as quays, docks and railways. It may well be that when the interests of navigation require it the Dominion Parliament has authority to authorize the compulsory acquisition of lands on the terms of paying compensation ; and it is to be noticed that the Acts of 1873 and 1894 contain provisions of that nature. Their Lordships do not desire to throw any doubt upon the validity of those provisions. But in the present case no attempt to apply them was made by the Commissioners, who took possession of and occupied the foreshore and bed without following the procedure laid down by the Railway Act ; and in their Lordships' view the provisions of s. 91, head 10, standing alone did not justify their proceedings.

But this by no means disposes of the case. It was undoubtedly within the power of the Province of Quebec, with a view to the improvement of the harbour of Montreal, to waive her strict legal rights and expressly or by inference to sanction the works undertaken for that purpose, and it must be considered whether such a sanction is to be inferred in the present case. In their Lordships' opinion it is. The

(1) [1898] A. C. 700, 713.

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Commissioners commenced to build their embankment in the year 1905, and the contract for the dry dock and ship repairing plant was entered into in 1910; but the Province took no part in the proceedings for an injunction, and in 1911 the Provincial Legislature passed the Quebec statute of that year, which referred to and impliedly sanctioned the operations of the Harbour Commissioners. It was not until the year 1919, when the works were far advanced, that the Attorney-General of Quebec intervened; and although at the time of his intervention he claimed to have the Commissioners excluded from possession of their works, he has at no time insisted on that claim, and is content to have the legal rights in the bed and foreshore of the river determined. Having regard to all these facts, their Lordships are satisfied that the Provincial authorities have waived any claim to interfere with the existing works, and that, so far as they are concerned, they are bound by what has been done.

The position of the City of Montreal is different, as the rights (if any) of the City authorities have at no time been waived; but in their Lordships' opinion no right of the City has been infringed. The claim put forward on their behalf that, as owners of the soil of First Avenue, they have a common law right to discharge through the end of that street where it abuts on the St. Lawrence the sewage of the City involves an extension of riparian rights which their Lordships cannot accept. The only right of the City to discharge their sewage into the river rests on the licence of the Provincial authorities, which was itself (as the statute of 1911 shows) made subsidiary to the proceedings of the Harbour Commissioners. The appeal of the City therefore fails.

In the result their Lordships are of opinion that the judgment of the Court of King's Bench should be affirmed so far as it dismissed the appeal of the City of Montreal, and so far as it declared that His Majesty, representing the Province of Quebec, was the sole owner of the foreshore and bed of the St. Lawrence at the place where the Commissioners constructed their works; but that the remainder of the judgment should be dissolved, and in lieu thereof it should be declared that the

statutes of the Dominion did not authorize the respondents, the Harbour Commissioners, to enter upon and take possession of the lands of the Province without compensation, but that, in view of the undertaking of the Attorney-General for the Province of Quebec not to interfere with the existing works, no order shall issue which would affect the present possession and use of the works of the Harbour Commissioners. As to costs, their Lordships will humbly recommend that the City of Montreal should pay the costs, as directed by the Court below, and also of this appeal, but that neither of the Attorneys-General should pay or receive costs, either here or in the Courts below.

THE TETREAULT APPEAL.

Their Lordships having now disposed of the appeal of the City of Montreal turn to that of Tetreault. This appeal, as they have already observed, involves considerations of a different order from those in the former appeal, which turned, among other things, on acquiescence. In the Tetreault case there has been no such acquiescence, and the question is purely one of legal title. The action was a possessory one based on art. 1064 of the Civil Code of Procedure of the Province of Quebec, which enacts that " the possessor of any immovable or real right, other than a farmer on shares or a holder by sufferance, who is disturbed in his possession, may bring an action on disturbance against the person who prevents his enjoyment, in order to put an end to the disturbance and be maintained in his possession."

The article goes on to say that " the action may be brought by any person who has had possession of an immovable or real right for a year and a day against any person who has forcibly dispossessed him."

Tetreault alleged that he was and had been for a number of years possessor as proprietor by valid titles of three contiguous immovable properties in the parish of Longue Pointe on the Island of Montreal, of a width of about four arpents and a-half, bounded by the river St. Lawrence, and that since he purchased these immovables he had always peacefully enjoyed them

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with the advantages and servitudes that belong to riparian proprietors ex jure naturae, including the use of the water in front of his properties and access to and egress from the river; that the Harbour Commissioners were executing works opposite these properties which have encroached on them and have deprived him of his access to the river and of the privileges mentioned; that the harbour authorities had no right to carry on these works without previous expropriation, and that no Federal legislation could be operative to take away his property. He claimed damages to a total of $133,020, and declarations as to his title and right to peaceful possession. The Harbour Commissioners asserted in answer a superior title and denied responsibility for what they had done. As the question of the validity of the Dominion statutes vesting his property in the bed and beach in the Crown in right of the Dominion arose, the Attorney-General for Quebec intervened in this appeal also, as well as the Attorney-General for the Dominion. The former maintained that the title to the beach and bed was vested in the Province, the latter that it was vested in the Dominion.

The land to which Tetreault laid claim is situated at some distance further down the river than that in the last appeal. It is in the parish of Longue Pointe, and their Lordships think that Tetreault has established his title to it. The Courts below did not declare that the works executed by the Commissioners (within whose present limits the property lies) had not encroached on Tetreault's property, but they thought that there was doubt as to the line of the high water mark of the river, and that as Tetreault had not established the line by a preliminary action of "bornage," the Court could not order the reinstallation of Tetreault. Into this question their Lordships do not deem it necessary to enter. They think, with Letourneau J., that there is a "bornage" in the high water line of the river sufficiently established to enable Tetreault at least to say that if he had rights of access to the river at all, these rights have been interfered with by the Commissioners.

Before entering on this question reference must be made

to the course taken by the proceedings. The action was tried by Lafontaine J. in the superior Court. He dismissed it with costs. A large amount of evidence had been taken, but the learned judge thought that Tetreault had failed in his proof. He rejected the claims of both the Attorneys-General, saying that the Attorney-General for the Province had not brought a proceeding of a kind appropriate to the circumstances, and should, if his case was to be dealt with, have instituted a proper petitory action. This being so, there was no necessity for pronouncing a judgment in favour of the claims of the Attorney-General for Canada against him.

Tetreault and the Attorney-General for Quebec both appealed, and the appeal was disposed of by the Court of King's Bench (consisting of Flynn, Tellier, Bernier, Letourneau and Hall JJ.) on May 14, 1924. A majority of four affirmed the judgment of the Superior Court ; Letourneau J. dissenting. The majority agreed with the trial judge that the evidence was insufficient for the establishment of encroachment on the property of Tetreault in the absence of a decree of " bornage," and that, therefore, in this merely possessory action the right of access could not be established. Letourneau J., on the other hand, considered that there was a sufficient " bornage," for the line of high water mark was the natural and legal boundary of Tetreault's land, and no further proof of it than had been given was necessary. He would have approved interference with Tetreault's title to the land taking place, if the question arose, only on the footing of expropriation with compensation, which the harbour authorities had not offered. The majority were, however, adverse on this point to Tetreault because he had not claimed on this footing, though they considered, notwithstanding this, that there might be a right in him as a riparian proprietor to access to the river. Such a right of access or servitude could not be established in a merely possessory action, for it might turn out to be subject to public rights of user.

Their Lordships would be unwilling, were the question really one of the exact boundary between the land, the

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property of Tetreault and the land where the works of the Commissioners were situated, to interfere with the concurrent findings on the evidence of the two Courts below. But they are of opinion that this question is not the real one. The boundary of the property possessed by Tetreault seems beyond doubt to have extended to high water mark whatever the line of high water mark might be established as being. If this be so, the question at once arises whether he was entitled, not by prescriptive servitude, but ex jure naturae, to rights of access to the river.

This question came under consideration by this Board in the case of *North Shore Ry. Co.* v. *Pion.* (1) The railway company had made a railway on the foreshore of a tidal and navigable river, along the frontage of the landowner's property, and had substantially interfered with his access to the river. It was held that by the French law prevailing in Quebec the landowner as riparian owner had the same rights of accès et sortie as he would have had if the river had not been navigable; and that the obstruction of these rights without Parliamentary authority was an actionable wrong. In the present case the St. Lawrence opposite the neighbourhood of Montreal is not tidal like the river St. Charles in *Pion's* case. (1) It is only navigable. But their Lordships think that this makes no difference, for the case of a river which is non-tidal, although navigable, is one to which the principles laid down by Lord Selborne in *Pion's* case (1) must apply a fortiori.

In delivering the judgment of the Judicial Committee, consisting of Lord Watson, Lord Bramwell, Lord Hobhouse and Sir Richard Couch besides himself, Lord Selborne said that the view of the Court of Queen's Bench could not be maintained, that, inasmuch as the beach of the river was public property, the landowner had no individual right, but only one to use it in common with other inhabitants of the country, and that the supreme Court of Canada was right in taking a contrary attitude. He adopted, as applicable as much in Quebec as in England, the principle laid down by Lord Cairns in *Lyon* v. *Fishmongers' Co.* (2), that the right belonging to

(1) 14 App. Cas. 612. (2) (1874) 1 App. Cas. 662, 671.

the owner of riparian land is different from the mere public right of navigation. "When this right of navigation," said Lord Cairns, "is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action, or restrained by an injunction."

Lord Selborne went on to point out that although the bank of a tidal river of which the foreshore is laid bare at low water is not always in contact with the flow of the stream, it is in such contact for a great part of every day in the ordinary and regular course of nature. This is an amply sufficient foundation for a natural riparian right. Moreover, although the solum of the river is in some one else than the riparian owner, that can make no difference. Lateral contact with the riparian land is sufficient.

Their Lordships have had their attention directed to the reservation, inserted in the grant to Tetreault's predecessors in title, in which the grantors, the Company of New France, in 1640, declared that the concession should not cause any prejudice to the freedom of the navigation, which is to be common to all the inhabitants of New France, and throughout all the places therein above conceded, and for this purpose that there should be left a royal highway of twenty toises in width all round the island of Montreal, from the river to the granted lands, and a similar distance on the river St. Lawrence from the brink of the same to the granted lands, the whole for the use of the said navigation and of passage by land. This was a mere reservation of a right of highway which, in the view their Lordships take of the case, cannot affect Tetreault's right of access, even if it extended beyond the foreshore to his land.

Their Lordships, therefore, base their judgment not on any determination of the precise boundaries of Tetreault's

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proprietary title, but on the view that he, as the owner of the three contiguous immovables in the parish of Longue-Pointe on the Island of Montreal, referred to in his declaration, the boundary of which extended to high water mark, had been disturbed without legal justification in his right of accès et sortie to the river. They think that the doctrine laid down in *North Shore Ry. Co.* v. *Pion* (1) applies not less to Tetreault's case.

They are of opinion that Tetreault was entitled to bring a possessory action claiming damages for disturbance of his rights of accès et sortie. The judgment of the Court of King's Bench should therefore be reversed. But as their Lordships are not in a position to estimate the amount of those damages, the case must go back to the Superior Court to have the amount ascertained. It may be that the Commissioners could have expropriated him in respect of their rights under s. 34 of their statute of 1894, or possibly by making use of the Railway Act of 1888, s. 144, or otherwise, and, if so, this will have to be taken into consideration in estimating his real loss. No such attempt appears to have been made, and their Lordships will therefore humbly advise His Majesty in the sense just indicated.

The Harbour Commissioners must pay Tetreault's costs here and below. The two Attorneys-General will neither have nor pay costs at any stage in the litigation.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents, the Montreal Harbour Commissioners: *Lawrence Jones & Co.*

Solicitors for respondent, Attorney-General for Canada: *Charles Russell & Co.*

(1) 14 App. Cas. 612.

[PRIVY COUNCIL.]

JERUSALEM - JAFFA DISTRICT GOVERNOR AND ANOTHER . . . } APPELLANTS ;

AND

SULEIMAN MURRA AND OTHERS . . RESPONDENTS.

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ON APPEAL FROM THE SUPREME COURT OF PALESTINE.

Palestine—Mandated Territory—Powers of Legislature—Expropriation—Compensation—Construction of Mandate—Urtas Springs Ordinance (No. 13 of 1925, Palestine), s. 2—Right of Appeal to Privy Council—Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), s. 1.

By the Mandate for Palestine, dated July 24, 1922, the Council of the League of Nations, acting under art. 22 of the Covenant of the League, entrusted to Great Britain the administration of Palestine. Art. 2 of the Mandate provided that Great Britain should be responsible for "safeguarding the civil and religious rights of the inhabitants of Palestine irrespective of race and religion." In 1923 an Order in Council authorized the High Commissioner for Palestine to promulgate such ordinances as might be necessary for the peace, good order, and government of the country, and were not inconsistent with the Mandate. The High Commissioner promulgated an Ordinance expropriating certain springs for the purpose of supplying water to Jerusalem, with certain provisions for compensation. In an action by the owners of the springs the Supreme Court (sitting as a Court of first instance) held that the Ordinance was ultra vires, on the ground that it was inconsistent with the Mandate in that the provisions for compensation were inadequate. Special leave to appeal was granted, all questions of jurisdiction being left open. An Order in Council had made provision for appeals to the Privy Council, but only from orders of the Supreme Court sitting as a Court of Appeal:—

Held (1.), that the appeal was competent, since the jurisdiction under the Mandate was jurisdiction in a foreign country within the description in the preamble to the Foreign Jurisdiction Act, 1890.

(2.) That it was the right and duty of the Court to consider whether the Ordinance was consistent with the Mandate, but that art. 2 had been misconstrued, and that the Ordinance was valid.

Art. 2 did not mean that in every case of expropriation for a public purpose full compensation must be given. Natural justice required that, in the absence of exceptional circumstances, fair provision should be made for compensation, but that depended not upon civil right, but upon the principles of sound administration, and it was not within the

* *Present:* VISCOUNT CAVE L.C., VISCOUNT DUNEDIN, and LORD PARMOOR.

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province of the Court to consider whether an Ordinance was within those principles. Further, the Ordinance did make adequate provision for compensation.

Judgment of the Supreme Court reversed.

APPEAL (No. 98 of 1925) from a judgment of the Supreme Court of Palestine, sitting as a High Court of Justice, dated June 25, 1925.

The appeal arose out of a petition by the respondents to the High Court of Justice, Palestine, to restrain the appellants, the District Governor, Jerusalem-Jaffa District, and the President of the Jerusalem Water Supply Commission, from taking water from the springs of Urtas village, in the neighbourhood of Jerusalem. The appellants were purporting to exercise powers conferred upon them by the Urtas Springs Ordinance, No. 13 of 1925 of Palestine.

The facts and the provisions of the Ordinance appear from the judgment of the Judicial Committee.

The petition was heard by the Supreme Court (Sir Thomas Haycraft C.J. and Corrie J.) sitting as a High Court. The learned judges held that the Ordinance was ultra vires and void, as being inconsistent with the Mandate for Palestine granted on July 24, 1922. The views of the learned judges appear from the present judgment.

The Palestine (Appeal to Privy Council) Order in Council, 1924, providing for appeals to His Majesty in Council only from the Supreme Court sitting as a Court of Appeal, the appellants applied to the Judicial Committee for special leave, which was granted on October 12, 1925, "all questions as to jurisdiction or otherwise being left open."

1925. Jan. 18. *Sir Douglas Hogg A.-G.* and *Hon. Stafford Cripps* for the appellants.

De Gruyther K.C. and *Kenworthy Brown* for the respondents. As to the competence of the appeal reference was made to the Foreign Jurisdiction Act, 1890, preamble and s. 1.

1926. Feb. 16. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. This is an appeal by the District

Governor of the Jerusalem-Jaffa District and the President of the Jerusalem Water Supply Commission from an order of the Supreme Court of Palestine, restraining them from taking water from the springs at Urtas, a village in the neighbourhood of Jerusalem.

In the month of May, 1925, the water supply of Jerusalem was causing anxiety; and on May 25 the High Commissioner for Palestine, acting under the Palestine (Amendment) Order in Council dated May 4, 1923, promulgated an Ordinance (called the Urtas Springs Ordinance, 1925) empowering the High Commissioner by order published in the Official Gazette to authorize the municipality of Jerusalem or such other authority as undertook the supply of water to Jerusalem to take water from the springs in the village of Urtas for augmenting the supply contained in the reservoirs at Solomon's Pools upon certain conditions set out in the Ordinance. On the same day the High Commissioner, acting under the Urtas Springs Ordinance, published in the Official Gazette an order whereby he authorized the municipality of Jerusalem to take over for a period not exceeding twelve months from the date of the order the water arising from the spring in Urtas for the purpose mentioned in the Ordinance. It appears that the spring at Urtas is the private property of the inhabitants of that village, who use the water for drinking and other domestic purposes, for watering their animals and for the irrigation of land planted with trees or with vegetables or other crops; and the respondents, who represent the inhabitants and landowners of Urtas, objected to the taking of the water and applied by petition to the Supreme Court for an injunction. The Supreme Court granted the injunction asked for, but stayed the operation of the order pending an appeal to His Majesty in Council, for which special leave has been granted.

A question was at one time raised whether an appeal would lie from the Supreme Court of Palestine to His Majesty in Council; but on the argument of the appeal this point was not pressed, and in their Lordships' opinion there is no doubt as to the competence of such an appeal. The Foreign

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Jurisdiction Act, 1890, applies to every foreign country in which "by treaty, capitulation, grant, usage, sufferance or other lawful means" His Majesty has jurisdiction, and provides that His Majesty may exercise any such jurisdiction in the same and in as ample a manner as if he had acquired that jurisdiction by the cession or conquest of territory. There can be no question that the jurisdiction exercised by this country under the League of Nations Mandate for Palestine comes within the above description, and accordingly that an appeal lies from the Supreme Court of Palestine to His Majesty in Council. Provision for such appeals has been made by the Palestine (Appeal to Privy Council) Order in Council dated October 9, 1924.

Before dealing with the substance of the appeal it is necessary to refer in some detail to the Ordinance which is in question, and to the instruments under which it was made.

By the Mandate for Palestine dated July 24, 1922, the Council of the League of Nations, acting under art. 22 of the Covenant of the League, entrusted to Great Britain the administration of the territory of Palestine which formerly belonged to the Turkish Empire. The Mandate contained the following among other provisions:—

"Art. 1. The Mandatory shall have full powers of legislation and of administration save as they may be limited by the terms of this Mandate.

Art. 2. The Mandatory shall be responsible for placing the country under such political administrative and economic conditions as will secure the establishment of the Jewish National Home, as laid down in the Preamble, and the development of self-governing Institutions, and also for safeguarding the civil and religious rights of all the Inhabitants of Palestine, irrespective of race and religion.

Art. 11. The Administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the country, and, subject to any international obligations accepted by the Mandatory, shall have full power to provide for public ownership or control of any of the natural resources of the

country or of the public works, services and utilities established or to be established therein."

By the Palestine Order in Council dated August 10, 1922, provision was made for the administration of Palestine by a High Commissioner with full executive powers; and authority to make Ordinances for the peace, order and good government of Palestine was entrusted to a Legislative Council, subject to a provision that no Ordinance should be passed which should in any way be repugnant to or inconsistent with the provisions of the Mandate. The institution of a Legislative Council did not prove successful; and on May 4, 1923, an amending Order in Council was made by which the legislative authority was transferred to the High Commissioner, who was thereby authorized to promulgate such Ordinances as might be necessary for the peace, order and good government of Palestine, subject to a condition that no Ordinance should be promulgated which should be in any way repugnant to or inconsistent with the Mandate. It is under the authority conferred by this Order in Council that the Urtas Spring Ordinance was promulgated.

It is unnecessary to state in full the provisions of the Ordinance, which may be summarized as follows: By s. 2 the High Commissioner was empowered by order published in the Gazette to authorize the municipality of Jerusalem or such other authority as undertook the supply of water to Jerusalem (therein called "the Board") to take for a period not exceeding twelve months the water arising from the Urtas Spring and to use it for augmenting the supply in the reservoirs of the Board at Solomon's Pools, but it was provided that the Board should ensure that there should be available from the spring sufficient water for the daily needs of the inhabitants of the village of Urtas for drinking and other domestic purposes and for their animals as well as for the irrigation of their lands which at the date of the order were planted with trees or other permanent plantations. By s. 3 it was enacted that if an order was made under the preceding section the Board might enter upon private land for the purpose of erecting at or near the spring a pumping engine

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and other machinery and might lay pipe lines from the spring to the reservoir at Solomon's Pools, provided that the Board should pay to the owner of such land compensation for any direct loss or damage thereby caused. By s. 4 it was provided that if any inhabitant of Urtas suffered loss by destruction of or damage to vegetables or other annual plants or crops planted on land irrigated by the spring, or by reason of his being prevented from planting vegetables and other annual plants or crops on land so irrigated, owing to the diversion of the supply of water to such land, the Board should pay to such inhabitant compensation for the loss so suffered. By s. 5 it was enacted that if any dispute should arise between the Board and any inhabitant of Urtas regarding the amount of water made available for him for any of the purposes provided for in s. 2 or as to the amount of compensation payable to him under s. 3 or s. 4, such dispute should be referred to a single arbitrator appointed by the High Commissioner, and the award of such arbitrator should be final; but it was declared that in any dispute which might arise as to the amount of water made available for any of the purposes specified in s. 2 the arbitrator should not award compensation in the form of a money payment, but should make an award determining the specific quantity of water which the Board was to make available for the use of the inhabitants.

The effect of this Ordinance was, first to secure to every inhabitant of the village of Urtas a sufficient supply of water for drinking and other domestic purposes and for his animals and for watering his trees and permanent plantations, and secondly to provide compensation for any loss which he might suffer by the use of his land for pumping machinery or the laying of pipe lines or the destruction of his vegetables or other crops or his inability to sow further crops, any question as to the sufficiency of the supply under the first category or as to the compensation payable under the second being referred to arbitration.

The Ordinance was held by the Supreme Court of Palestine (Haycraft C.J. and Corrie J.) to be ultra vires and void on grounds which are fully stated in their judgments. They

considered it to be their duty to examine the provisions of the Ordinance in order to determine whether it contained anything which was in any way repugnant to the terms of the Mandate, and in particular to art. 2 of that instrument, which made the Mandatory responsible for "safeguarding the civil and religious rights of all the inhabitants of Palestine irrespective of race and religion"; and they held that the Ordinance did contain terms repugnant to that provision, and was therefore wholly void. Both the learned judges recognized that the article quoted could not have been intended to prohibit all interference with any of the civil rights of any inhabitant of Palestine as they existed at the date of the Mandate, for to attach that meaning to the article would (as Corrie J. said) be to render most of the work of government impossible. But they interpreted the article as requiring that where in the interest of good government the Administration interfered with the antecedent rights of any inhabitant he should receive full compensation for such interference, this being, as the learned Chief Justice said, a "recognized principle of sound legislation." Having arrived at this interpretation of art. 2, they proceeded to inquire whether full compensation was in fact provided by the Ordinance for the water taken; and they held, upon grounds to be hereafter referred to, that it was not, and accordingly that the Ordinance was an infringement of art. 2, and was therefore ultra vires and void.

In their Lordships' opinion the Supreme Court was fully justified in entertaining an argument as to the validity of the Ordinance. The Ordinance was made under the authority of the Order in Council of May 4, 1923, and if and so far as it infringed the conditions of that Order in Council the local Court was entitled and indeed bound to treat it as void. Among those conditions was the stipulation that no Ordinance should be promulgated which was repugnant to or inconsistent with the provisions of the Mandate, and in view of this stipulation it was the right and duty of the Court to examine the terms of the Mandate and to consider whether the Ordinance was in any way repugnant to those terms.

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But it appears to their Lordships that the construction put by the Supreme Court upon art. 2 of the Mandate is not justified by its terms. The article stipulated that the Mandatory shall be responsible for (among other things) "safeguarding the civil and religious rights of all the inhabitants of Palestine irrespective of race and religion." This does not mean—as the Supreme Court recognized—that all the civil rights of every inhabitant of Palestine which existed at the date of the Mandate are to remain unaltered throughout its duration; for if that were to be a condition of the Mandatory's jurisdiction no effective legislation could be possible. Nor does it, in their Lordships' opinion, mean that in every case of expropriation for public purposes full compensation shall be paid. Their Lordships agree that in such a case, and in the absence of exceptional circumstances, justice requires that fair provision shall be made for compensation. But this depends, not upon any civil right, but (as the Chief Justice said) upon principles of sound legislation; and it cannot be the duty of the Court to examine (at the instance of any litigant) the legislative and administrative acts of the Administration, and to consider in every case whether they are in accordance with the view held by the Court as to the requirements of natural justice. In their Lordships' opinion the key to the true purpose and meaning of the sentence quoted from art. 2 of the Mandate is to be found in the concluding words of the article "irrespective of race and religion," and the purpose of the article is to secure that in fulfilling the duty which is incumbent upon every Government to safeguard the rights from time to time belonging to the inhabitants of the territory the Mandatory shall not discriminate in favour of persons of any one religion or race. There is no suggestion that any such discrimination is to be found in the Ordinance now under consideration.

But even assuming (contrary to their Lordships' opinion) that any legislation providing for the appropriation of property to public uses without proper compensation would be an infringement of the Mandate, and therefore of the Order in Council, it does not appear to their Lordships that the

Urtas Springs Ordinance would be invalid on that ground. The view apparently taken by the learned judges of the Supreme Court was that the Ordinance was open to objection, (*a*) because any question as to the sufficiency of the supply of water left to the inhabitants for domestic uses and the watering of animals and permanent plantations is under s. 5 to be determined by an arbitrator and not by the Courts, (*b*) because no compensation is provided for any failure to give a sufficient supply for those purposes, and (*c*) because the compensation which is to be paid for damage to or loss of crops is to be assessed (on principles which the learned judges refer to as generous) by an arbitrator and not by a Court. In their Lordships' view the Ordinance is not open to criticism on any of these grounds. As to (*a*) the right to sufficient water for the purposes mentioned in the proviso to s. 2 of the Ordinance was specifically reserved to the villagers; and it was fully competent to the High Commissioner in reserving this specific right of a somewhat special character to provide for the determination by a specially designated person of any difference which might arise as to the limits of the right.

As to (*b*) their Lordships think that there is a misapprehension. It is true that no compensation is provided for a breach of the proviso in cl. 2 of the Ordinance; but this is because a breach of that clause would be a wrong for which the persons aggrieved would be entitled to recover full damages in the local Courts. As to (*c*) there is no question of ousting the jurisdiction of the Court. A Court may award damages for a wrong, but cannot (unless expressly authorized by statute to do so) award compensation for a lawful expropriation; and when a right to compensation is given by statute, there can be no objection to the amount being determined in such manner as the statute may provide. No doubt an arbitrator, like everybody else, may go wrong; but it would be contrary to the universal practice to provide compensation for the contingency of an error being made by the assigned tribunal.

It is only necessary to add that, even if objection could be

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taken to the provisions of cl. 5 of the Ordinance, it may be doubted whether that objection would of itself be sufficient to render invalid the Ordinance as a whole; but upon this point it is unnecessary for their Lordships to express a final opinion.

For these reasons their Lordships are of opinion that this appeal should be allowed, and that the order of the Supreme Court should be set aside and the petition dismissed, and that the respondents should pay the costs of those proceedings, including the costs of this appeal; and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Burchells.*

Solicitors for respondents: *Ellis & Willes and Ingpen & Armitage.*

[HOUSE OF LORDS.]

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ASSESSMENT COMMITTEE OF KINGSTON UNION AND OVERSEERS OF THE POOR OF PARISH OF HAMPTON . . . . . } APPELLANTS;

AND

METROPOLITAN WATER BOARD . . RESPONDENTS.

ASSESSMENT COMMITTEE OF KINGSTON UNION AND OVERSEERS OF THE POOR OF PARISH OF TEDDINGTON . . . . . } APPELLANTS;

AND

METROPOLITAN WATER BOARD . RESPONDENTS.

ASSESSMENT COMMITTEE OF KINGSTON UNION AND OVERSEERS OF THE POOR OF PARISH OF HAMPTON WICK . . . . . } APPELLANTS;

AND

METROPOLITAN WATER BOARD . RESPONDENTS.

Rates—Poor Rate—Water Undertaking—Hereditaments in various Parishes—Directly and indirectly profitable Hereditaments—Profits Basis—Contractor's Basis—Parochial Assessments Act, 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 1.

In rating a water undertaking extending over several parishes, in the absence of special circumstances, the rateable value of the hereditaments of the undertaking in any particular parish should be ascertained on the profits basis, i.e., upon a calculation based upon the profits earned by the whole undertaking in the preceding year and an apportionment of the total rateable value between the several parishes, having regard to the directly and indirectly productive hereditaments therein, according to the recognized practice.

Under the provisions of the Metropolitan Water Act, 1902, the Metropolitan Water Board took over, either for cash or water stock, the undertakings of eight metropolitan water companies, which supplied water for domestic purposes to London and the adjoining districts, and

* *Present:* VISCOUNT CAVE L.C., LORD ATKINSON, LORD BUCKMASTER, LORD CARSON, and LORD BLANESBURGH.

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carried them on as one undertaking. The Board was restricted by statute as to its charges for water, and any deficiency in its funds was to be met by levying a deficiency rate. Down to the year 1920 the rateable hereditaments of the Board, which included directly productive hereditaments, such as service pipes, and indirectly productive hereditaments, such as reservoirs and pumping stations, were assessed throughout the area of supply on the profits basis; but in that year the assessing authorities of a certain union claimed to make assessments on the contractor's basis, i.e., on the basis of allowing a reasonable percentage of the capital value of the hereditaments, whether directly or indirectly productive, belonging to the Board in each parish, without regard to the profits of the undertaking as a whole. On an appeal by the Board, the assessing authorities contended that, the Board being a public body and occupying the hereditaments for the purpose of carrying out their statutory duties and not for the purpose of earning profits, the true method of ascertaining the rateable value of the hereditaments in question was not the profits basis but the contractor's basis. Quarter sessions accepted this contention and upheld the assessments, subject to a case for the opinion of the Court upon the question whether their determination was right in law:—

Held, that, there being no special circumstances found by the case, the hereditaments were assessable on the profits basis.

Decision of the Court of Appeal [1925] 2 K. B. 509 affirmed.

APPEALS from orders of the Court of Appeal affirming orders of the King's Bench Division upon cases stated by the Middlesex Quarter Sessions. (1)

All the appeals raised the same point.

Under the provisions of the Metropolis Water Act, 1902, by which the Metropolitan Water Board was constituted, the Board carried on as one undertaking the undertakings formerly carried on by several companies for the supply of water in the metropolis and adjoining districts, including the parishes of Hampton, Teddington, and Hampton Wick (all in the Kingston Union), to which these appeals relate.

The Board appealed against rates made in October, 1920, for the said parishes for the relief of the poor and other purposes on the ground that they were overrated in respect of the gross estimated rental and rateable value of the hereditaments belonging to them in those parishes. The gross and rateable values for which the Water Board contended were arrived at upon the basis upon which all parts of their undertaking had previously been rated—namely, on the

(1) [1925] 2 K. B. 509.

basis of the receipts and expenditure (known as the "Profits Basis"). The assessment committee on the other hand arrived at the values for which they contended by taking a percentage of the agreed structural value of those parts of the Board's undertaking situate in the parishes in question (known as the "Contractor's basis.")

Quarter sessions dismissed the appeals, subject to special cases stated for the opinion of the High Court. The Divisional Court (Lord Hewart C.J., Avory and Acton JJ.) quashed the orders of quarter sessions and directed judgments to be entered at quarter sessions for the Water Board reducing the assessments. The Court of Appeal, by a majority (Bankes L.J. and Lawrence J.; Atkin L.J. dissenting), affirmed the decision of the Divisional Court.

The facts are fully stated in the report of the case before the Divisional Court and the Court of Appeal and sufficiently appear from the opinion of the Lord Chancellor.

1925. Nov. 23, 24, 26. *Mitchell-Innes K.C.* and *Hon. Sir Malcolm Macnaghten K.C.* (with them *W. Hedley*) for the appellants. The question is whether in arriving at the rateable value of the respondents' hereditaments in the parishes in question the quarter sessions were bound by law to adopt what is known as the profits basis, i.e., ascertaining the rateable value of the respondents' whole undertaking on the basis of the receipts and expenditure shown by their revenue accounts for the financial year next preceding the date of the rate and apportioning the value so ascertained between the several parishes, having regard to the directly and indirectly productive hereditaments situate in each parish in the manner usually adopted in such cases, or were at liberty to adopt what is known as the contractor's basis, i.e., taking a reasonable percentage of the capital value of the hereditaments owned by the respondents in each parish. The question which quarter sessions had to determine was what was the rent at which the hereditaments in question might reasonably be expected to let from year to year under the conditions set out in the Parochial Assessments Act, 1836.

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No statutory provision makes the profits basis obligatory in the case of waterworks or other undertakings extending over a number of parishes, but the Courts below have held that that is the result of the authorities. In the appellants' submission there is no case that makes any particular basis obligatory on the rating authority. On the contrary any such suggestion has always been repelled by the Court. That being so, it was open to the rating authority to choose between the two bases, and their determination, being upon a question of fact, is not open to review. In view of the constitution of the Board as a public body occupying the hereditaments in question, not for the purpose of profit, but for the purpose of performing its statutory duty, the profits basis is not the true test.

[They referred to the Metropolitan Water Act, 1902 (2 Edw. 7, c. 41), ss. 2, 15, 17, and the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.).]

The Board is restricted as to its profits and is indemnified against loss by its statutory right to levy a deficit rate. It has nothing in common with an ordinary commercial concern. There is a stability in the Board which ought to be reflected in the rateable value of its hereditaments, and this stabilized value can only be secured by the percentage basis. The profits basis may be properly applied to a commercial company where the object of the undertaking is the making of profits, but it has no application to a case of this kind. Profits must be regarded as regulating rateable value just so far as they contribute to the rent which the hypothetical tenant might be expected to pay for the hereditaments in question. It may even happen that the profits basis may result in the complete annihilation of rateable value. As to the authorities: In *Reg.* v. *Mile End Old Town Overseers* (1) the profits basis was assumed, but there was there no question of any alternative basis, and the case dealt only with the method of apportionment. *Rex* v. *West Middlesex Waterworks* (2) is founded upon the earlier decision, and it contains no statement that the profits basis is to be the exclusive and only correct

(1) (1847) 10 Q. B. 208. (2) (1859) 1 E. & E. 716.

method of ascertaining rateable value in the case of waterworks or other undertakings extending over several parishes. *Sheffield United Gas Light Co.* v. *Sheffield Overseers* (1) goes no further. None of those cases supports the proposition that the profits basis is compulsory in law in the case of waterworks. *North and South Western Junction Ry. Co.* v. *Brentford Union Assessment Committee* (2) shows that both methods are permissible and that this House will not dictate to the rating authority which method is to be adopted. That is a matter for them to determine for themselves : see *Port of London Authority* v. *Orsett Union Assessment Committee* (3) ; and *Great Central Ry. Co.* v. *Banbury Union.* (4) *Worcester Corporation* v. *Droitwich Assessment Committee* (5) and *Peterborough Corporation* v. *Stamford Union* (6) show that the basis contended for by the respondents may lead to the extinction of rateable value altogether. In *Reg.* v. *London School Board* (7), where no profit could be made, the contractor's basis was adopted. So also in *London County Council* v. *Erith Overseers* (8) (a sewerage case). There Lord Herschell said that the true test of beneficial occupation was not whether a profit could be made, but whether the occupation was of value to the tenant. Lord Herschell's explanation in *Sculcoates Union* v. *Dock Co. at Kingston-upon-Hull* (9) of his own judgment in the *Erith* case (8) shows that his general remarks on the profits basis in the earlier case referred to cases of commercial profit. In cases where no profit can be made the contractor's basis is to be applied. But if a profit of, say, 1*l.* is obtained, then it is said that the profits basis must be adopted. That argument leads to a curious anomaly. Then it is said that the whole practice in waterworks cases is opposed to the appellants' contention. But in the special circumstances of this case *West Kent Main Sewerage Board* v. *Dartford Union Assessment Committee* (10) affords an answer to that argument. This

(1) (1863) 4 B. & S. 135.
(2) (1888) 13 App. Cas. 592, 594.
(3) [1920] A. C. 273, 284, 295.
(4) [1909] A. C. 78, 84, 85.
(5) (1876) 2 Ex. D. 49.
(6) (1883) 31 W. R. 949.
(7) (1886) 17 Q. B. D. 738.
(8) [1893] A. C. 562.
(9) [1895] A. C. 136, 148.
(10) [1911] A. C. 171, 176.

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case has nothing to do with cases where the undertaking is being carried on at a profit. The Board is not concerned with profits at all. In view of the results produced by the profits basis that system fails in certain years to show what rent a hypothetical tenant would give for the premises, and the only system which will produce an equitable result is the contractor's basis: see *Metropolitan Water Board* v. *St. Marylebone Assessment Committee* (1); *Liverpool Corporation* v. *Llanfyllin Assessment Committee*. (2)

Tyldesley Jones K.C. and *S. O. Henn Collins* for the respondents were not called on.

The House took time for consideration.

1926. Jan. 29. VISCOUNT CAVE L.C. My Lords, these appeals are concerned with the method in which the Metropolitan Water Board should be assessed for rating purposes in the Kingston Union.

The Board was incorporated by the Metropolitan Water Act, 1902, for the purpose of taking over, either for cash or for water stock to be issued by the Board, and carrying on the undertakings of eight metropolitan water companies. The Board was to provide, by the creation of a sinking fund, for the redemption of the water stock within a period of 100 years from March 31, 1903, and was to pay interest on such stock until redemption. It was to supply water for domestic purposes within the limits of supply at a rate per annum which (under an amending Act of 1907) was not to exceed 5 per centum of the rateable value of the premises supplied; and any deficiency in its funds, whether for meeting the expenses of the undertaking or for paying or providing for the interest and sinking fund of the water stock, was to be levied by a deficiency rate. The Act of 1902 was further amended by the Metropolitan Water Board (Charges) Act, 1921; but as that statute did not apply to the assessment now in question, it is unnecessary further to refer to it.

The Board in due course took over the undertakings of the

(1) [1923] 1 K. B. 86. (2) [1899] 2 Q. B. 14.

water companies and issued the necessary stock; and it now supplies water for domestic purposes throughout the limits of supply, which include not only the administrative county of London, but also considerable parts of the counties of Middlesex, Surrey, Kent, Essex and Hertford.

From the establishment of the Board down to the year 1920 the rateable hereditaments belonging to the Board, which are scattered over many parishes and include waterworks, reservoirs, filter beds and main and service pipes, were assessed throughout the area of supply on what is known as the "profits basis," that is to say, upon a calculation based (in a manner to which I will refer later) on the profits earned by the whole undertaking; but in October, 1920, the assessing authorities in the Kingston Union became dissatisfied with that method of assessment and claimed to make the assessments upon what is known as the "contractor's basis," that is to say, upon an estimate of what would be an adequate annual remuneration to a contractor for providing the rateable hereditaments of the Board in each parish without regard to the profits of the undertaking as a whole. The Board objected, contending that the profits basis should be adhered to, and in respect of the three Middlesex parishes in the Kingston Union (Hampton, Teddington and Hampton Wick) appealed against the rate to the Middlesex Quarter Sessions. The justices in quarter sessions confirmed the rate, subject to a special case which they stated for the opinion of the High Court; but on the argument of the special case a Divisional Court of the King's Bench Division upheld the contention of the Board and reduced the assessments accordingly, and that decision has been affirmed by the Court of Appeal. Hence the present appeal.

It may be added that the question to be determined is one of principle only and not of figures; for it is expressly stated in the special case that "it was admitted or proved that if the method of assessment for which the appellants [the Board] contended was applied the assessment appealed against should be reduced to the amounts claimed by them, and if the method of assessment contended for by the respondents

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[the assessment committee] was applied, the assessment appealed against was right." But the figures at issue are large, for the effect of the decision of the High Court is to reduce the assessment of the Board (to take an example) in the parish of Hampton from 85,446*l.* gross and 67,862*l.* rateable to 52,220*l.* gross and 34,220*l.* rateable.

My Lords, the cardinal principle upon which hereditaments are by law assessable for rating purposes is still that which is set out in s. 1 of the Parochial Assessments Act, 1836, and which requires the rate to be made "upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." But in applying that principle, so simple in appearance, to certain classes of hereditaments, great difficulties were encountered, and it was found necessary for rating experts and the Courts to have recourse to hypotheses of a more or less violent character. In particular, there was an obvious difficulty in applying the general principle laid down in s. 1 of the Act to a water company or other body supplying water in a number of different parishes and possessed in those parishes of reservoirs, mains and other property necessary for the purposes of its undertaking. The mains and other works in any particular parish, taken by themselves, might conceivably produce no rent at all, for it is almost impossible to suppose that any person would wish to become the tenant of them; but the same hereditaments, if looked upon as part of a great undertaking extending over a large and populous area, might be quite indispensable to the undertakers (who must be regarded as possible tenants) and so might command an extortionate rent. In these circumstances it was desirable, in order that a fair assessment might be arrived at, to devise some formula which, while allowing a fair value to the hereditaments in each parish, would not compel the undertakers to

pay rates on an aggregate sum exceeding the whole yearly value of their undertaking; and accordingly rating surveyors, soon after the passing of the Act of 1836, began to assess waterworks and other like concerns, such as railways, canals, gasworks, etc., upon the basis of the profits earned by the whole undertaking. From the gross receipts of the undertakers for the preceding year they deducted working expenses, an allowance for tenant's profit, and the cost of repairs and other statutable deductions, and treated the balance remaining (which would presumably represent the rent which a tenant would be willing to pay for the undertaking) as the rateable value of the entire concern. It was then necessary to distribute this rateable value among the various parishes into which the undertaking extended, and this was effected by dividing the hereditaments in each parish into indirectly productive assets (such as intakes, filter-beds, reservoirs, pumping stations and carrying or pumping mains) and directly productive assets (such as the service pipes which actually carried the water to the consumers), and by allowing to the parish a percentage on the structural (or contractor's) value of property of the former class contained in the parish, and a proportion of the remainder based on the water revenue arising there. Thus, a series of assessments was reached which, while giving to each individual parish a fair proportion, based upon the hereditaments which it contained and the revenue which it produced, of the total rateable value, did not in the aggregate exceed the rental which the undertakers or any other possible tenants might be expected to pay for the whole undertaking in any year.

The precise date at which the profits basis was first devised and the name of its first inventor do not clearly appear; but it is plain from the reported cases that its adoption was immediate and enduring. The method was approved by the Court in *Reg.* v. *Mile End Old Town Overseers* (1); and that case was followed in *Reg.* v. *West Middlesex Waterworks* (2), where the method was explained in a lucid judgment by Wightman J., who laid stress on the duty of the Court

(1) 10 Q. B. 208. (2) 1 E. & E. 716.

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to protect the occupier of an apparatus extending over a number of parishes from being rated beyond the rateable value of the whole taken together. In *Sheffield United Gas Light Co.* v. *Sheffield Overseers* (1), the method was applied to a gas company and enforced by Blackburn J. and a strong Court. Since that time the method has been followed in innumerable assessments throughout the country, and has been constantly approved by the Courts and by this House; and, to quote a statement of Lawrence J. in the Court of Appeal (2), "it is common ground between the parties that, ever since the year 1847, the profits basis and no other has been applied in ascertaining the rateable value of the parochial portions of all waterworks in this country, whether occupied by trading companies or by public bodies." In the case of the Metropolitan Water Board the same basis has, as I have said, been adopted in all the unions down to the year 1920. It is still adopted in all the unions over which the system of the Board extends other than the Kingston Union; and its application to the hereditaments of the Board in the several parishes and boroughs in the metropolis has recently been approved by the quarter sessions for the county of London.

My Lords, it is obvious that, in view of this long practice favourable to the profits basis, those who contend for the application of a different rule undertake a difficult task. But they have in their favour, not only the opinion of an author of acknowledged skill and experience (Ryde on Rating, 5th ed., p. 386), but also the dissenting judgment of Atkin L.J. in the present case; and it is necessary, therefore, to examine carefully the arguments advanced on the appellants' behalf.

First, it is said that the decision in favour of the present appellants pronounced by the Middlesex Quarter Sessions was a finding of fact and not of law; that the justices had before them the alternative of adopting either the profits basis or the contractor's basis, and preferred the latter as better enabling them to ascertain the yearly rent which a hypothetical tenant would pay for the hereditaments to be assessed; and accordingly that their decision was not open to review

(1) 4 B. & S. 135. (2) [1925] 2 K. B. 584.

by the Divisional Court. If this were wholly true, it would be difficult to understand why the justices stated a case for the opinion of the High Court; but in fact the case itself negatives any such inference. The case states the main contentions of the assessing authorities (the present appellants) as follows: —

"(B.) That the appellants [the Metropolitan Water Board] being a public body and occupying the hereditaments in question for the purpose of carrying out their statutory duties and not for the purpose of earning profits, the profits earning basis contended for by the appellants was not the true test of the rateable value of the hereditaments in their occupation.

(C) That the true method of ascertaining the rateable value of the hereditaments in question was that of applying a reasonably remunerative rate of interest to the capital value of the hereditaments."

The case then proceeds: "We were of opinion that the contentions of the respondents were correct. We accordingly upheld the gross estimated rental of 85,446*l.* and the rateable value of 67,862*l.* and dismissed the appeal with costs. The question for the opinion of the Court is whether our said determination was right in law."

From this it is evident that the justices were of opinion that in law the profits basis was inapplicable to an undertaking such as that of the Metropolitan Water Board, that is to say, to an undertaking carried on in performance of a statutory duty and not for profit, and that the contractor's basis was in principle the only proper method to apply to such a case, and on that ground affirmed the assessment of the overseers. It would have been difficult for them to indicate more clearly that the question which they intended to submit was one of rating law and not of fact; and it was, therefore, plainly open to review.

But, secondly, it was argued that the justices were right, and that the profits basis is applicable only to companies carrying on their business for profit, and not to a body which, like the Metropolitan Water Board, occupies the

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hereditaments to be assessed for the purpose of carrying on its statutory duties and not for the purpose of earning profits. To this argument one answer is that the statement as applied to the Metropolitan Water Board is inaccurate. The Board does and must aim at earning a profit, for without a very large profit it could not provide for payment of the interest and sinking fund on its stock. But apart from this observation the argument appears to me to lose sight of the foundation upon which the profits formula rests and of the purpose which it is intended to serve. The object of the assessing authorities must be that laid down in s. 1 of the Act of 1836—namely, to find the rent at which the hereditament to be assessed might reasonably be expected to let from year to year upon the conditions prescribed in the section. For this purpose they are entitled, as the Courts have held, to regard the actual occupants—in this case the Metropolitan Water Board—as possible tenants, and to consider what rent those occupants might reasonably be expected to pay for the privilege of occupying the hereditaments, having regard to the profits to be derived from such occupation; but in so doing they must take the hypothetical tenants as they are, and with all the limitations and restrictions which are imposed upon them by law and which they could not "reasonably be expected" to leave out of sight. If other tenants can be found who might be expected to give a higher rent, well and good; but it can hardly be doubted that the Board, with all its limitations, would pay a better rent for the hereditaments which it occupies than any other tenants who could conceivably be found, and the basis of assessment must, therefore, be the rent which rebus sic stantibus the Board could and would pay.

The above view is supported by a series of decisions in the Courts and in this House. In *Mersey Docks* v. *Cameron* (1) it was established that property is not exempt from rateability merely because it is occupied for public objects and without the possibility of commercial profit. In *Worcester Corporation* v. *Droitwich Assessment Committee* (2) it was

(1) (1865) 11 H. L. C. 443. (2) 2 Ex. D. 49.

held that, where the occupiers of property were prevented by statute from deriving the full pecuniary benefit which it was capable of producing, the land was to be rated with reference to the amount of profit actually made, and not with reference to the amount which might have been earned by the occupiers if they had not been subject to restrictions. In a well-known textbook (Ryde on Rating, 5th ed., p. 393) the judgment of Mellish L.J. in this case has been criticized on the ground that it substitutes, as the basis for calculating rateable value, the profit or income which the tenant receives for the rent which the tenant might be expected to pay; but if the whole judgment is read, I think it will appear that the learned Lord Justice did not intend to lay down any such proposition, and referred to the profit which the tenant received only as indicating the rent which, having regard to that profit, he might reasonably be expected to pay. In *Peterborough Corporation* v. *Stamford Union* (1) it was held that, where waterworks were occupied by a sanitary authority which was precluded by law from making any profit out of the works, the works had no rateable value. This decision has been treated as reducing the principle to an absurdity, and in the present case the Lord Chief Justice appears to have regarded it with a certain amount of scepticism. It appears to me that so far as the Court held that the hypothetical tenants—in that case the sanitary authority—could not be expected to pay any rent for the property they were justified by the principle of law which is now being considered; but it may be that the assessing authority should have considered whether or not some other hypothetical tenants would give something for the privilege of occupation and should have assessed the property accordingly. But any doubt as to the correctness of the decision in the *Droitwich* case (2) is set at rest by the decision of this House in *Port of London Authority* v. *Orsett Union Assessment Committee* (3), where the profits formula had been applied to the property of the Port of London Authority—a body which so far as is relevant to this

(1) 31 W. R. 949; affirmed 12 Q. B. D. 1.
(2) 2 Ex. D. 49.
(3) [1920] A. C. 273.

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case was very similar in its constitution to the Metropolitan Water Board—and the assessment was approved by this House. The particular point decided in that case, namely, the allowance of a tenant's profit, is not now in question; but the speeches of the learned Lords who took part in the decision are entirely favourable to the principle of the *Droitwich* case. (1)

On the other hand, the reasons which, until this time, have told against the application of the contractor's basis to an undertaking like that of the Metropolitan Water Board are still operative. There are many cases in which that method is applicable: see, for instance, *Reg.* v. *London School Board*. (2) But to apply it in a particular parish to a part situate in that parish of an undertaking extending into several parishes, and without regard to the returns from the undertaking as a whole, would be to produce that very injustice which the profits formula was designed to prevent. It is true that counsel for the assessment committee in their argument before the House admitted that the rateable value of the Water Board's hereditaments in the several parishes within their area ought not in the aggregate to exceed the rateable value of the whole undertaking; but they did not suggest any method of ensuring that result other than the adoption of the profits basis, and it is certainly not ensured by the only alternative basis suggested by the appellants. The reasoning which led Atkin L.J. to prefer the contractor's basis has, no doubt, considerable force; but the contrary view has prevailed for nearly eighty years, and I venture to think that it is now too late for the Courts to adopt a different course.

Upon the whole I conclude that the justices in quarter sessions were wrong in holding that the profits basis did not in the case of the Metropolitan Water Board enable the Court to determine the rent which a hypothetical tenant from year to year might reasonably be expected to pay for the hereditaments in the several parishes concerned in this appeal, and that on the contrary that method was applicable

(1) 2 Ex. D. 49. (2) 17 Q. B. D. 738.

and (on the facts stated by quarter sessions) should have been applied to those hereditaments. By this I do not mean that in no case can another method be adopted by a rating authority in assessing waterworks for rating purposes; but in order to justify that course it would be necessary that the authority should be satisfied that there are special circumstances in the case sufficient to make it necessary for them to exclude the recognized formula of assessment and to resort to some other principle, and in the case now under consideration no such circumstances are found.

I mention one point of detail. It is said that at all events the percentage which in the calculations of the Metropolitan Water Board has been allowed to the appellant parishes on the value of the indirectly productive hereditaments of the Board in their area is insufficient. That percentage is $2\frac{1}{2}$ per cent., and is based on the relation of the profits of the entire undertaking of the Board to the aggregate structural value of its assets; and it is said that the proper percentage to be allowed according to the authorities is 4 per cent. upon the capital value of the land and 5 per cent. upon the capital value of the works and mains. If this point were open to the appellants, it would be necessary to consider the bearing upon this case of the decision in *Reg.* v. *South Staffordshire Waterworks Co.* (1) and cases of that kind; but in fact the point does not appear to me to be open. It is found by the case that if the method of assessment contended for by the respondents is applied, the assessment appealed against was right; and this being so, no question can now be raised upon the details of the calculation by which that assessment was reached. Upon this point, therefore, I express no opinion.

For the reasons which I have given I am of opinion that this appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

LORD ATKINSON. My Lords, the facts of these cases have, so far as is necessary for the purpose of the decision of this appeal, been already fully stated, and the most important

(1) (1885) 16 Q. B. D. 359.

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and instructive of the authorities bearing on the points in controversy have been cited in the King's Bench Division, in the Court of Appeal, and in the argument addressed to your Lordships by the counsel for the appellants. The result of these authorities applicable to cases such as this will, I think, be found to be correctly set forth in vol. xxiv. of Lord Halsbury's Laws of England, pp. 30, 37 and 38, and in the judgment of Lord Parker in the case of *Metropolitan Water Board* v. *Chertsey Assessment Committee*. (1) The method followed in the case of waterworks which run through and supply several parishes is apparently this. The rateable value of the whole undertaking is estimated by the method prescribed, as I shall presently show, in the Parochial Assessment Act of 1836. Then from this sum, in order to ascertain the rateable value of the portion of these works situated in a given parish, the rateable value of the indirectly productive parochial portion of the whole undertaking is deducted. The remainder is the ascertained rateable value of the productive works of the whole undertaking, which sum is then apportioned among the several parishes through which the works of the undertaking runs and which they supply. The method of apportionment is apparently this. The sum to be apportioned is divided amongst the different parishes according to the proportion which the amount of the gross or net receipts earned in each parish bears to the receipts of the same character, like to like, earned by the whole undertaking. The rateable value of the indirectly productive portion of the undertaking situated in each parish is then separately ascertained and added to the value of the directly productive works so ascertained. The rateable value, however, if ascertained by this method, for all the parishes which the undertaking supplies, and in which portions of its works are situated, must never in the aggregate exceed the amounts of the rateable value assessed upon the undertaking as a whole.

Lord Parker of Waddington, in the case of *Metropolitan Water Board* v. *Chertsey Union Assessment Committee* (2), expresses himself with his accustomed accuracy and clearness

(1) [1916] 1 A. C. 337. (2) [1916] 1 A. C. 337, 359.

in reference to this method thus. He said: "My Lords, the problem in all rating cases is to ascertain the rent which a tenant might be fairly expected to pay by the year for the privilege of occupying the hereditament the subject of the assessment. In some cases the problem may be easy of solution, but in others, where the property consists of parts only of an undertaking such as a railway or water or gas undertaking, it is extremely hard to solve. The Courts have, however, from time to time laid down, or approved, certain empirical rules to be applied to various classes of case. With regard to water undertakings the practice has been to classify the various hereditaments which, though part of a single undertaking, have to be rated separately in the several parishes where they are situate as either directly or indirectly productive of profit. Those which are only indirectly productive of profit have been generally assessed according to the following rule: The assessment authority has taken 4 per cent. on the price which the company paid for the land, and 5 per cent. on the cost incurred by the company in erecting the buildings or works on the land, and has treated these percentages as a measure of the rent which the hypothetical tenant would be willing to pay."

Lord Parker avoids the error which is so often fallen into in these valuation cases—namely, that of confounding the thing to be measured, the reasonable rent which the hypothetical tenants would be willing to pay, with the measure suggested to fix the amount of that rent. He then proceeds to suggest what is the origin and foundation of this rule. He said: "The origin of this rule is not very clear, but it may, I think, be explained as follows: In considering what the hypothetical tenant will pay by way of rent the company itself cannot be excluded as a possible tenant. If there are possible tenants other than the company, the annual rent may be estimated on a competitive basis, but if, as is generally the case, the company is the only possible person who would be likely to give any rent at all for the property, the competitive basis is excluded. In such cases, if the company is in fact paying any rent for the hereditaments in question,

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such rent is evidence of what the company would be willing to pay. If the company is owner as well as occupier, then, inasmuch as it is by reason of its occupation out of pocket to the extent, at least, of interest on its capital expenditure in acquiring and building on the land it occupies, the amount of such interest is good evidence of what the company would be willing to pay by the year for the privilege of continuing its occupation."

This method of dealing with rateable value on the basis of percentages on the cost of construction has been styled in argument "the contractor's basis" in contradistinction to the "profits basis." In the case of *Liverpool Corporation* v. *Llanfyllin Assessment Committee* (1) A. L. Smith L.J., in delivering judgment, deals with these percentages precisely as does Lord Parker, treating them as mere measures, mere helps, to ascertain the reasonable rent a hypothetical tenant would be willing to pay for the occupation of the hereditament to be assessed. He says that the mode of estimating rateable values in this way has been greatly simplified by the decision in *Reg.* v. *London School Board* (2) to the effect that the occupying owner of a hereditament may naturally be himself treated as the hypothetical tenant of the hereditament.

In my view there is only one method by which the rateable value of a hereditament, the occupation of which is valuable, can be legally ascertained, and that is by the method prescribed by s. 1 of the Parochial Assessments Act of 1836—namely, by the ascertainment of the rent at which the hereditament might reasonably be expected to be let from year to year to a hypothetical tenant, free from the rates and charges, etc., "rebus sic stantibus." By these three latter words I mean to express the considerations which are expanded in the following passage in the judgment of Lord Buckmaster in the case of *Port of London Authority* v. *Orsett Union Assessment Committee.* (3) He said that the hereditament the reasonable rent of which is to be ascertained must be that hereditament "as it stands, with all its privileges, opportunities

(1) [1899] 2 Q. B. 14. (2) 17 Q. B. D. 738.
(3) [1920] A. C. 273, 305.

and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament." It is the occupation of the hereditament in respect of which the hereditament is assessed. Should that occupation be absolutely worthless to everybody, it will have no rateable value, but, on the other hand, if the occupation of it may be very valuable to a hypothetical tenant though that occupation does not secure to him any profit, or bring in to him any income, it may be assessed as by this section provided. No statement of the law on this point could be more unsound and misleading than that which I rather thought had been put forward by the appellants' counsel in argument in this appeal—namely, "No income, no taxable value, no profits, no taxable value."

The following cases clearly establish that this is not the law. First, the *School Board* case, *Reg.* v. *London School Board* (1), and, second, the *Sewer* cases, the *London County Council* v. *Erith Overseers* (2), and *West Kent Main Sewerage Board* v. *Dartford Union Assessment Committee.* (3)

In none of those cases would the hypothetical tenant have derived any profit or any income from his occupation of the hereditament to be assessed. The rent which a hypothetical tenant could be reasonably expected to be willing to pay for this occupation is a difficult matter to ascertain, and consequently the authorities only indicate what may be treated as safeguards to aid in the measuring of it. For instance, the profits derived or derivable from the occupation of the hereditament are helps to the measurement of it, because the hypothetical tenant would naturally consider what rent he could afford to pay to secure the chance of making these profits by the occupation of it. And the assessing authority, on its side, would naturally consider what the chance of realizing that profit by the occupation of it was reasonably worth.

In like manner, where the contractor's basis is taken as a help, the percentages payable by him, as Lord Parker and

(1) 17 Q. B. D. 738. (2) [1893] A. C. 562.
(3) [1911] A. C. 171.

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A. L. Smith L.J. have pointed out, are only measures of that rent.

My Lords, I cannot help thinking, as I have already said, that in this case the appellants have been betrayed into confounding the measure with the thing to be measured. The thing to be measured is, in all cases, the reasonable *rent* which the hypothetical tenant would be willing to pay. Nothing which can be suggested as a measure of that thing can be substituted for the thing itself. Again, the appellants admit, in para. 11 of their case, that the rateable values of the Water Board's hereditaments in the several parishes within their area must not in the aggregate exceed the rateable value of their whole undertaking; but they contend that in law it is not necessary for them to ascertain the total rateable value of their entire undertaking as a first step in ascertaining the rateable value of their hereditament in any parish. They make no suggestion, however, as to how, in practice, the rateable value of the hereditaments in the several parishes in their area, in the aggregate, is to be kept within the admitted limit, the rateable value of the whole undertaking, unless the latter limit is first ascertained. If the rateable value of half a dozen of the parochial sections of their undertaking were, in ignorance of the ascertained value of the whole, to be valued at a rate so high that the aggregate of them would exceed the rateable value of the whole undertaking when subsequently ascertained, then either these six parochial sections should necessarily be revalued, or the remainder of the parochial sections should be valued at so low a sum as would bring the aggregate within the limit; or, lastly, the limit itself should ex post facto be deliberately stretched, so as to cover this aggregate. It may be that the assessment committee are not compelled by law to perform this operation of putting the cart before the horse in the manner they claim to be free to do, but the attempt to perform it would in practice, in my view, turn out to be impracticable, expensive and most unbusiness-like.

The appellants, in the same paragraph of their case, state

that the profits obtained by the Water Board are not profits in the true sense of the term, and are no guide to rateable value, because the Board are completely protected from loss by their power to levy a security rate. But to be protected from loss in his occupation of a rateable hereditament is an advantage which would naturally make the hypothetical tenant all the more anxious to become tenant to the hereditament, and all the more willing to pay a higher rent for it than if he had no protection against loss. The appellants set forth in the second paragraph of their case what, in their view, is the question for decision on this appeal. The paragraph runs thus: "2. The question to be determined in this appeal is whether the appellants were obliged in law to assess the annual value of the portions of the respondents' water undertaking situated in the above parishes by a calculation based on the supposed profits earned by their whole undertaking during the year ending March, 1920, or whether it was open to the appellants in the circumstances of this case to make the assessment upon what is known as the 'contractor's basis' by applying a percentage to the capital value of the hereditaments in question."

The first question set forth in this paragraph is not very intelligible to me. I do not know whether it is meant to ask if the assessed annual value of the whole undertaking is to be divided between its parochial sections on some principle, and according to some method which is not indicated. The second question apparently is whether it is permissible to assess on the contractor's basis the whole undertaking irrespective of whether some of its parts are directly productive, and some only indirectly productive, or whether in a similar condition of things existing in the several parochial sections of the undertaking, they can proceed to assess on the contractor's basis alone.

The answer to these questions would appear to me to be this—that so far as the assessment committee aim at substituting the methods of assessment thus named for those prescribed by the first section of the Parochial Assessments Act of 1836, they cannot resort to either of the two methods

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named. They are bound to proceed on the principle and in the manner by that section prescribed. But as I have already explained, the methods named in this paragraph may furnish the assessment committee with measures of the reasonable rent the hypothetical tenant would be willing to pay for the occupation of the hereditament to be assessed. They are not in any sense substitutes for the statutory methods prescribed by the statute of 1836.

The appeal, I think, fails and should be dismissed with costs.

LORD BUCKMASTER (read by LORD CARSON). My Lords, I think that this appeal should fail. In my opinion, since the decision in *Reg.* v. *Mile End Old Town Overseers* (1), it has been accepted that the ordinary way of determining the rateable value of each part of a water company's property consists in arriving at the total rateable value of the whole undertaking, and distributing that total among the several parishes which together form the whole area of its activities. It does not follow that it has ever been laid down that such method is exclusive and must be of universal application. No such principle has, in my opinion, resulted from the decisions, but what does result is that a company undertaking the business of supplying water should prima facie be assessed upon this well-known plan, and it would lead to confusion and endless multiplication of difficulty if this were not done, but as regards a company which, either by reason of its special and peculiar statutory restrictions or by reason of any other fact, cannot be regarded in the same light as that of an ordinary water company, it is open to consider whether other methods of valuation may not properly be adopted. The special facts, however, on which any such alternative method is adopted should be found in the special case stated by quarter sessions, in order that it may be considered whether they are adequate to entitle a deviation from a well recognized rule. In the present case it is strongly argued that such special circumstances exist, but I can find nothing in the

(1) 10 Q. B. 208.

special case setting out such circumstances as those to which I have referred. The nearest is to be found in para. 4 (B), in which it is urged that as the business of the Metropolitan Water Board (the present respondents) is done "for the purpose of carrying out their statutory duties and not for the purpose of earning profits," the profit-earning basis contended for is not the true test of the rateable value, and that contention was upheld by the Court of quarter sessions. That conclusion is, in my opinion, unsound. It has been established by more than one authority, that notwithstanding such a fact the method for which the respondents contend can and should be applied, and if the quarter sessions intended to decide otherwise the decision would be wrong. It is at least open to argument that existing circumstances are such as to render the ordinary method of rating inapplicable, but such circumstances must be set out in a special case and made the subject of substantive argument before the Courts.

LORD CARSON. My Lords, for myself I agree with the judgment delivered by the noble Viscount, the Lord Chancellor, on the Woolsack.

LORD BLANESBURGH (read by LORD CARSON). My Lords, I have had the advantage of reading the judgment of my noble and learned friend Lord Buckmaster and I entirely concur in it.

It may be, as was so strongly urged by Sir Malcolm Macnaghten, that the magistrates in the present case rejected the profits basis as propounded by the respondents for the reason (which they felt to be compelling) that it required them to leave one of the largest reservoirs of the Water Board rated at 25,000*l.* only, when that reservoir was, admittedly it was said, of the capital value of 1,000,000*l.*, and when it had, without change of circumstance in relation to the Water Board, for twenty years been rated at 50,000*l.*

This reduction, so it was said, had resulted from two causes.

The first was that a deficiency rate levied by the Board in

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aid of water rents and amounting to upwards of 500,000*l.* had, in reliance upon the decision of the Divisional Court in the case of *Metropolitan Water Board* v. *St. Marylebone Assessment Committee* (1), been excluded by the Board from their receipts brought into account.

The second was that the net rateable value of the entire undertaking as actually ascertained had been apportioned rateably between the directly and indirectly productive hereditaments occupied by the Board instead of being applied first in the allowance of a reasonable rate of interest on the value of the indirectly productive hereditaments so occupied.

These considerations are each of them important in result, and the first strikes me as raising a question of great moment.

I say no more, as counsel for the respondents have not been heard, and moreover neither question is, I think, on the form of the special case, open to debate.

The important issue disclosed in the argument whether in a year in which this Water Board levies a deficiency rate large in amount, the decision in the *Marylebone* case (1), if it be correct, permits of the adoption of the profits basis as the proper method for arriving at the governing figure of rateable value for the entire undertaking remains to my mind a serious question for determination in some future case in which it arises and is properly raised.

Orders of the Court of Appeal affirmed, and appeals dismissed with costs.

Lords' Journals, Jan. 29, 1926.

Solicitors for the appellants: *Gibson & Weldon, for W. Taylor, Kingston-on-Thames.*

Solicitor for the respondents: *C. A. Hunt.*

(1) [1923] 1 K. B. 86.

[HOUSE OF LORDS.]

BIRKDALE DISTRICT ELECTRIC SUPPLY COMPANY, LIMITED . . } APPELLANTS;

AND

CORPORATION OF SOUTHPORT . . RESPONDENTS.

H. L. (E.)* 1926 Feb. 12.

Electricity—Provisional Order—Maximum Charge—Local Authority as Undertakers—Transfer to new Undertakers, with Board of Trade's Approval—Collateral Contract by new Undertakers, without Board of Trade's Approval, not to exceed Prices of adjoining Borough—Ultra vires——Electric Lighting Act, 1882 (45 & 46 *Vict. c.* 56), *s.* 11—*Electric Lighting Act*, 1909 (9 *Edw.* 7, *c.* 34), *s.* 14, *sub-s.* 1.

By a Provisional Order of 1898 the Birkdale Urban Council were constituted electricity undertakers in Birkdale with power to charge up to a certain maximum price, but with authority to make special agreements with particular consumers as to price.

By a deed of transfer of December 31, 1901, approved by the Board of Trade, the Birkdale Council transferred the undertaking to an electric supply company with a provision for retransfer if the company made default in their obligations as undertakers. By a supplemental deed of the same date, made without the approval of the Board of Trade, the company agreed with the Birkdale Council not to charge higher prices than those charged in the adjoining borough of Southport. In 1911 the Birkdale District and the contractual rights and obligations of the Birkdale Council were transferred to the Southport Corporation, but the company still remained electricity undertakers in Birkdale.

The company having recently begun to charge higher prices than the Corporation, the Corporation brought an action to restrain the company's breach of agreement. The company contended that the supplemental agreement was ultra vires both under the Electric Lighting Act, 1882, s. 11, which prevented them divesting themselves of their statutory powers without the consent of the Board of Trade, and under the general law applicable to statutory undertakings:—

Held, that the agreement did not offend against the Electric Lighting Acts of 1882 and 1909, and that it was not void at common law as being incompatible with the due discharge of the company's duties.

Ayr Harbour Trustees v. *Oswald* (1883) 8 App. Cas. 623 distinguished.

York Corporation v. *Henry Leetham & Sons, Ld.* [1924] 1 Ch. 557 considered.

Decision of the Court of Appeal [1925] Ch. 794 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Astbury J. (2)

* *Present:* EARL OF BIRKENHEAD, LORD ATKINSON, LORD SUMNER, LORD WRENBURY, and LORD CARSON.

(1) [1925] Ch. 794. (2) [1925] Ch. 63.

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The facts are fully stated in the report of the case before the Court of Appeal.

The question raised by the appeal was whether the appellants, the Birkdale District Electric Supply Co., were bound by clauses in two contracts dated December 31, 1901, and August 2, 1904, and made between the Urban District Council of Birkdale (predecessors of the respondents, the Corporation of Southport) and the appellants, whereby it was agreed that the price of electrical energy supplied by the appellants in the urban district of Birkdale should not exceed the price of electrical energy supplied in the adjoining borough of Southport.

The appellants having in breach of these agreements begun to charge prices in Birkdale in excess of the prices charged in Southport, the respondents brought this action against them for an injunction to restrain them from so doing. The appellants contended that the clauses in question were ultra vires as being inconsistent with the due exercise by them of the powers vested in them by statute, and also as being contrary to specific provisions in the Electric Lighting Acts.

Astbury J. held that the clauses might conceivably in the future hamper the appellants in the proper performance of their statutory duties and were therefore ultra vires, and he dismissed the action. The Court of Appeal (Pollock M.R., Warrington and Sargant L.JJ.) held that the agreements were not incompatible with the exercise by the appellants of their statutory duty, and granted an injunction. The arguments on the present appeal were the same as those used in the Court of Appeal, and need not be repeated.

1925. Dec. 14, 15. *Clauson K.C.* and *Guest Mathews* for the appellants.

W. A. Greene K.C. and *Hugh Bischoff* for the respondents.

The House took time for consideration.

1926. Feb. 12. EARL OF BIRKENHEAD (read by LORD ATKINSON). My Lords, this is an appeal from an order of the Court of Appeal dated April 28, 1925, reversing an order

made by Mr. Justice Astbury dated November 11, 1924, in an action in which the respondents were plaintiffs and the appellants were defendants.

The plaintiffs in this action claimed an injunction restraining the defendant company from charging the plaintiff Corporation, or any other private consumer of electrical energy, any price for the energy so supplied exceeding the price charged by the plaintiff Corporation for a similar supply of electrical energy to a private consumer within the area which on December 31, 1901, and August 2, 1904, constituted the borough of Southport, or from otherwise committing a breach of the provision contained in cl. 4 of a certain indenture dated December 1, 1901, styled a supplemental indenture, or of the provisions of cl. 1 of another indenture dated August 2, 1904.

By the Birkdale Electric Lighting Order, 1898 (confirmed by the Electric Lighting Orders (Confirmation No. 8), Act, 1898), styled in the case the Birkdale Lighting Order, the Birkdale Urban District Council, called for shortness "the Council," were empowered to supply and distribute electricity for all public and private purposes within the urban district of Birkdale, as the same was constituted at the commencement of that Order. It is alleged in para. 8 of the plaintiffs' statement of claim, and admitted in para. 2 of the defendants' amended statement of defence, that the plaintiff Corporation is now carrying on an electric lighting undertaking under and by virtue of the Southport Electric Lighting Order, 1891, within an area which at the two dates aforesaid constituted or included the borough of Southport. Sect. 59 of the Birkdale Lighting Order of 1898 provided that the undertakers (i.e., the Council) might at any time after the making of the Order, with the consent of the Board of Trade by a deed approved of by them, transfer their powers, duties and works to any company or person subject to such exceptions or modifications (if any), and for such period, and on such terms as might be specified therein, either as to the whole or any part or parts of the area of supply, and during the said period, but subject to the provisions of the Order, the company or person should

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to the extent of the powers, duties and liabilities so transferred be the undertakers for the purposes of this Order.

By s. 71 of this Order it is provided that nothing in the Order shall exempt the undertakers or their undertaking from the provisions of, or deprive the undertakers of the benefits of any general Act relating to electricity, or to the supply of or price to be charged for energy which may be passed after the date of the Order. Sect. 20 of the general Act (the Electric Lighting Act of 1882) enacted that the undertakers should not in making any agreement for a supply of electricity show any undue preference to any local authority, company or person, but save as aforesaid they might make such charges for the supply of electricity as might be agreed upon, not exceeding the limits imposed in pursuance of the licence order or special Act authorizing them to supply electricity. Sect. 11 of this same general Act of 1882 apparently indicates what were then considered to be the kind of transactions which might involve the divesting of a local authority of the powers given to it. The section runs thus: "Any local authority who have obtained a license, order, or special Act for the supply of electricity, may contract with any company or person for the execution or maintenance of any works needed for the purposes of such supply, or for the supply of electricity within any area mentioned in such license, order, or special Act, or in any part of such area; but no local authority, company, or person shall by any contract or assignment transfer to any other company or divest themselves of any of the legal powers given to them, or legal liabilities imposed on them by this Act, or by any license, order, or special Act, without the consent of the Board of Trade."

The acts which the section deals with are positive acts, contracts for the execution or maintenance of works or the supply of electricity within an area, and could not, I think, by any stretch of its wording, be held to apply to the negative act of contracting only to charge for a term a price for the commodity it vends, which price it was in itself perfectly entitled to charge. It would appear to me that such a contract

is really a contract by a local authority to exercise the power given to it in a particular area, and in a particular way, rather than a contract to transfer those powers to another authority or person. However this may be, the restriction imposed by this section was evidently considered too wide, for by the Electric Lighting Act of 1909 (9 Edw. 7, c. 34) the words from the words "but no local authority" to the end of the section are by s. 14 struck out from it, and the following provision is made: "A local authority, company, or person who have obtained a licence, order, or special Act for the supply of electricity shall not, by transfer or otherwise, divest themselves of any of the powers, rights, or obligations conferred or imposed upon them by the Electric Lighting Acts, or by any licence, order, or special Act, otherwise than under and in accordance with a provision contained in a licence, order, or special Act authorising such a divestiture."

Sects. 25 and 26 of the Order must, I think, be examined closely in order to determine what was the condition of things, what the rights and obligations of the respective parties, when on December 31, 1901, the Urban District Council transferred its undertaking to the Birkdale District Electrical Lighting Co., Ld. The sections run as follows:—

"25. The prices to be charged by the undertakers for energy supplied by them shall not exceed those stated in that behalf in the Fourth Schedule in the first and second sections thereof respectively or in the case of a method of charge approved of by the Board of Trade such price as the Board shall on approving such method determine."

"26. Subject to the provisions of this Order and of the principal Act and to the right of the consumer to require that he shall be charged according to some one or other of the methods above mentioned the undertakers may make any agreement with a consumer as to the price to be charged for energy and the mode in which those charges are to be ascertained and may charge accordingly."

I turn now to the indenture of December 31, 1901, made between the Birkdale Urban District Council, referred to as "the Council," and the Birkdale Electrical Supply Co., Ld.

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It begins by reciting the Birkdale Provisional Order, thereinafter referred to as "the Order," and its confirmation Act of 1898. It then recites s. 59 of this Order. It then recites that the Council in consideration of 700*l.* have agreed to transfer to the company the undertaking authorized by the Order and all their powers, duties and liabilities, subject to the exceptions and modifications and upon the terms thereinafter appearing, and that the company have agreed to accept this transfer. The Council then proceed to transfer their undertaking and all its rights, duties and liabilities under the Order to the company, who, save as thereinafter appears, shall be the undertakers for the purposes of the Order. It is then provided that six of the sections of the Order shall not apply to the company. Sect. 52 is one of those, but that is the very section of the Order which provides elaborately for the application of all the moneys received by the undertakers, and by its last two lines it enacts that any deficiency of income in any year not answered out of the reserve fund shall be charged upon and payable out of the local rates. That provision is swept away. It does not affect the company at all. There are many other provisions in this deed which are irrelevant to the question for decision. The result of them, however, is that they practically leave the company free to carry on their enterprise as any other commercial company would do—namely, according to their own views as to what is best for their own economic and industrial interests. The profits are not dedicated to any public purpose; they belong to their shareholders. Their directors are not in any true sense in the position of trustees to any one unless to their own shareholders.

I now turn to the second instrument dated December 31, 1901, and styled the supplemental indenture. It is made between the same parties as the deed of transfer. It begins by reciting that the Council agreed to transfer to the company their powers under the Birkdale Electric Lighting Order, 1898, upon certain terms and conditions; that some of those terms and conditions included in the draft deed of transfer are intended to be exercised in the same way as by this

supplemental indenture is provided; that others of those terms and conditions have not been included in the draft, but are in reality part of the consideration for the transfer and are intended to be binding both upon the company and the Council, and to that end have been included in this supplemental deed.

Then come ss. 4 and 5 of this deed containing the provisions impeached as illegal, out of which this litigation has arisen. They run as follows:—

"4. Subject to any order hereafter made by the Board of Trade the price to be charged by the company to private consumers of electrical energy shall be for any quantity up to 20 units in any quarter 13*s.* 4*d.* for any quantity not exceeding the equivalent of 100 hours of supply at the maximum demand in any quarter at the rate of 7*d.* per unit and for any further quantity in such quarter in excess of the equivalent of 100 hours of supply at such maximum at the rate of 2*d.* per unit. But if in any year the price of electrical energy supplied exceeds the price of electrical energy supplied in the adjoining borough of Southport the before-mentioned prices shall be reduced and for so long as may be necessary in order that the said price may not exceed the price in the borough of Southport.

5. The company shall supply to the Council all electrical energy required by them for the lighting of the public lamps and town hall buildings at the rate of 2*d.* per unit. In this indenture the expression 'unit' shall have the same meaning as in the Fourth Schedule to the Order."

We approach now the second supplemental indenture dated August 2, 1904. It practically supersedes the two indentures last mentioned, though it purports not to do so. It recites the two previous deeds, and then recites that the company have requested the Council to permit them to charge a flat rate of 5*d.* per unit as an alternative to the prices mentioned in the first supplemental indenture, where the consumer is willing to be supplied on those terms, and that the Council have agreed to grant such permission. It is then witnessed that subject to any order made by the Board of Trade the

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prices to be charged by the company to private consumers of electrical energy supplied after January 1, 1904, shall be on the maximum demand system, unless the consumer elects as thereinafter mentioned to be supplied on a flat or even rate, not exceeding 5*d.* per unit, and where the wirings and fittings are the property of the company not exceeding 6*d.* per unit. The remaining provisions are so important for the matter in hand that it is desirable to set them out at length. They begin: "But if at any time the foregoing price exceeds the price of electrical energy supplied in the adjoining borough of Southport the foregoing prices shall be likewise reduced and for so long as may be necessary in order that the same may not at any time exceed the price in the said Borough the expression 'unit' in this clause shall have the same meaning as in the First Schedule to the said Order.

"2. The company shall deliver to every consumer in the district a notice stating that he will be charged at the maximum demand rate as above mentioned unless he elects on or before the Twenty-fifth day of March One thousand nine hundred and four (1) to be charged on the flat rate system of fivepence per unit and the company shall append to such notice a form to be filled up by the consumer and sent to the company if he desires *to so elect* and each consumer who sends such notice so electing to the company shall be charged on the flat rate system.

"3. This agreement shall be without prejudice to and shall not be taken to in any way affect any contract between the company and any consumer.

"4. The foregoing arrangement may be terminated by the Council or by the company on the Thirty-first day of December, One thousand nine hundred and four by either party giving to the other twenty-one days' previous notice in writing and thereupon the company shall revert to the prices mentioned in the said indenture.

"5. Nothing herein contained shall affect the price to be charged to the Council for the lighting of public lamps the town hall buildings fire station and infectious diseases hospital but in all respects except as regards the before

(1) Sic.

mentioned prices to be charged to private consumers the provisions of the before-mentioned indentures shall remain in full force."

My Lords, as I have already pointed out, these provisions suggest rather an enforcement of the company's powers than a denudation of them. It is the company who proprio vigore are putting pressure on their consumers to accept the flat rate in order to escape the demand based on the maximum system. It is the company who are to reduce the flat rate to the borough of Southport. It is the company who are to deliver to every one of their customers the notice that he will be charged the maximum demand unless he elects to be charged on the flat rate system. This arrangement may be terminated in four months. The price charged by the borough of Southport to its customers is, no doubt, the price which this company desires to force its customers to pay. That may have been arranged with the Corporation of Southport. There may have been a good commercial reason for the plan, for instance, it may have prevented competition between those two sets of undertakers. What, in fact, the company does is this: they say to their consumers—you must pay us the maximum prices which we are entitled to demand and be paid, but if you so elect you will only be charged a flat rate within our limit which we are also entitled to be paid. I am quite unable to see how the fact that the flat rate so offered for acceptance is the same as that demanded and taken in the borough of Southport amounts, on the part of the company, either to an abandonment of their powers, or, to the commission of an act incompatible with the just and proper exercise of those powers. No evidence has been given that the proposed flat rate is oppressive, or that its exaction interfered with or checked the industrial success of the company. Even if one assumed that the Corporation and the company agreed between themselves to set up this flat rate system, I cannot see how that fact entitles the appellants to the relief they claim. The contention of the appellants, I know, is that it is the company's business to determine the rates at which it will supply electric energy to

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its customers; and that if it binds itself to demand and charge the rates fixed by the Southport Corporation, that in effect amounts to a transfer to the latter body of the powers of the company to determine its own rates and charges.

My Lords, I have no doubt that this contention is unsound. By the Southport (Extension) Order, 1911, confirmed by the Local Government Provisional Order Confirmation (No. 10) Act, 1911, the Birkdale urban district was incorporated with the borough of Southport, and special provisions were included in the Extension Order, art. XI. (3.) (c), for the purpose of protecting the appellants in the enjoyment of their electricity undertaking, notwithstanding that their area had been included in the borough, and also for the purpose of preventing the powers possessed by the respondents under the aforesaid Electric Lighting Order of 1891 from being used so as to interfere with the appellants in the carrying on of their undertaking.

The appellants have relied strongly on a well established principle of law, that if a person or public body is entrusted by the Legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties. Many authorities were referred to in support, or rather in illustration of this principle, from *Mulliner* v. *Midland Ry. Co.* (1) and *Ayr Harbour Trustees* v. *Oswald* (2) down to *York Corporation* v. *Henry Leetham & Sons.* (3) A good example of the length to which the principle is carried is afforded by the case of *Paterson* v. *Provost of St. Andrews.* (4) There the magistrates of a burgh from time immemorial, for behoof of the inhabitants, held a golf links, subject to the obligation of preserving the same for the purpose of the game of golf and for the recreation and amusement of the inhabitants. The magistrates had from time to time exercised powers of management over the links. They proposed to

(1) (1879) 11 Ch. D. 611.
(2) 8 App. Cas. 623.
(3) [1924] 1 Ch. 557.
(4) (1881) 6 App. Cas. 833.

make a macadamized road outside and along the boundary of the links where that boundary adjoined certain fens let by them in 1820, but no longer in law part of the links. An inhabitant of the burgh, and a member of the golf club and others, sued for an interdict to restrain the magistrates either from making the road or permitting any road to be used in the specified place for wheeled traffic. The case was strenuously contested. Lord Selborne L.C., Lord Blackburn and Lord Watson gave judgments. The real point in controversy reduced itself to this—whether the alteration of the surface of the site of the road, and the permission to use it for carts and carriages, would substantially interfere with the obligation of the magistrates to preserve the ground for the purpose of golf. It was held that the evidence proved that it would have no substantial interference with the practice of golfing, and that the use of the road might be reconciled with its due observance; but that it was not consistent with that obligation for the magistrates to alienate any part of the ground in question, or to abdicate their existing power of administration, either by granting private easements to particular individuals or by dedicating the road when made to the public, thereby creating a public easement. The case was argued by a distinguished and even brilliant Bar. The third and fourth claims put forward by the plaintiffs were that the magistrates had no right to construct or permit or authorize the defenders, or any of them, to construct a road for carts and carriages along the northern boundary of the links, and fourth, that neither the magistrates nor the other defenders were entitled to use or to authorize or permit the use of the portion of the links adjoining the northern boundary of the parcels of ground (i.e., the ground identified in the evidence) as an access for carts and carriages. Lord Blackburn said in delivering judgment (1): "Now the proposition put forward in the third and fourth [claims], that those two purposes are, under all circumstances, and in every way, beyond the power of the provost, the magistrates, and the town council, I think it is perfectly plain is too

(1) 6 App. Cas. 848, 851.

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wide a proposition a great deal. Such things may be done in such a way as to interfere with the primary purposes for which the lands are held, namely, golfing and recreation, in which case I agree that they should not be done. On the other hand, such things may be done in such a way as not to interfere with this use, and though the motive may be a wish to give an advantage to a particular person who owns a house, or any other particular motive they like, yet so long as it does not injure or interfere with the rights which the inhabitants possess to have those lands preserved for the public recreation or enjoyment, more particularly for the game of golf, I do not see that the appellants have any right to complain." Lord Watson said: "My Lords, what the magistrates and town council were proposing to do at the time when this action was raised appears to me to have been this, they were acting upon the assumption that it was within their competency to confer upon the public at large a right of way over a portion of the ground which it was their duty to preserve for purposes consistent with the rights of the inhabitants; and they justified their position upon the ground that as matters stood at that date, no right of the inhabitants would be invaded thereby. I think that was a mistaken view of the law and of the extent of their power, because they would thereby have vested in others a right which might become inconsistent with the rights of the inhabitants at some future time."

In none of the authorities cited in the Court of Appeal, or, indeed, before Astbury J., was the principle I have mentioned questioned. The problem was throughout, on the facts proved, to bring the case within the principle. The *York* case (1) was somewhat severely criticized in the Court of Appeal. The facts of it are peculiar, and having regard to this peculiarity and to the acute criticism of Sargant L.J. (2) (which I adopt), I regard that case as distinguishable.

I am of opinion that the appeal fails and should be dismissed, and I so move your Lordships.

(1) [1924] 1 Ch. 557. (2) (1833) 5 B. & Ad. 469.

LORD ATKINSON. My Lords, I concur in the opinion of my noble and learned friend which I have just read.

LORD SUMNER. My Lords, this appeal raises the question, whether the appellants can avoid, as having been ultra vires their powers, the obligation imposed on them by cl. 4 of their supplemental indenture of December 31, 1901, and by cl. 1 of their further supplemental indenture of August 2, 1904. These clauses agreed, as between the appellants and the Birkdale Urban District Council, the prices which the appellants were to charge for electrical energy supplied by them to private consumers, whom they were empowered to supply, and they further provided for a reduction of these prices to the level of those charged for such a supply in the adjoining borough of Southport, when and so long as the latter prices should be lower than those agreed.

My Lords, I do not think that, in entering into the agreement which these clauses express, the appellant company offended against the express statutory provisions relied on—namely, those of s. 11 of the Electric Lighting Act, 1882, and of s. 14, sub-s. 1, of the Electric Lighting Act, 1909. These clauses prohibit such a company, except with the consent of the Board of Trade, from transferring or divesting themselves of any of the legal powers conferred by or under the Electric Lighting Acts or the Birkdale Electric Lighting Order, but they did not transfer to the Birkdale Union District Council their legal powers to charge for electricity supplied, nor did they divest themselves of their power to charge. The undertaking, including this power to charge, had, by a separate deed and with the consent of the Board of Trade, been transferred to the appellants by the Birkdale Union District Council. The power was not re-transferred to or revested in the Birkdale Council, for that would have defeated the main transaction. It was and remains vested in the appellants. It is a power which is one and indivisible, although in the exercise of it various sums may be charged from time to time. All that has happened is, that a contract has been made relating to the mode in which that power is to be used. If

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so, the consent of the Board of Trade was not required under the statutes, nor are the agreements in the supplemental indenture within the prohibitions therein contained.

Are they, then, void at common law as being ultra vires the appellants, a trading company, incorporated to exercise statutory powers vested in them in the public interest under the authority of the Legislature? This is a doctrine, which it may be unwise to circumscribe within the limits of an inelastic definition. We have, however, a long series of decisions, extending over nearly a century, and at any rate illustrating the cases to which the rule has been understood to extend. With the exception of *York Corporation* v. *Henry Leetham & Sons* (1) no case has been cited, in which a contract by a trading company to compound with a customer without limit of time for the price to be paid for services rendered to him, has been declared to be ultra vires, and we were told that the diligence of counsel had failed to find any other case. Certainly I have been able to go no further.

Hitherto the question has mainly arisen, where servitudes have been claimed over the property, which the alleged servient owner acquired under statutory authority and for the purposes of a public undertaking. In *Rex* v. *Inhabitants of Leake* (2) a public right of way was alleged to exist over the bank of a drain constructed by statutory Commissioners and reparable as such by the inhabitants of Leake. In *Staffordshire and Worcestershire Canal Navigation* v. *Birmingham Canal Navigations* (3) a right was claimed to have water discharged from the respondents' canal into the canal of the appellants at the bottom of a flight of locks connecting the two navigations, which the respondents had not theretofore sought to recover by pumping. In *Mulliner* v. *Midland Ry. Co.* (4), land, acquired under statutory powers, had been alienated pro tanto by an express grant of a right of way through one of a series of arches, which carried the defendants' line and station over some low

(1) [1924] 1 Ch. 557.
(2) (1833) 5 B. & Ad. 469.
(3) (1866) L. R. 1 H. L. 254.
(4) 11 Ch. D. 611.

ground ; as to this case, however, *In re Gonty and Manchester, Sheffield and Lincolnshire Ry. Co.* (1) and observations by Warrington L.J. in *South Eastern Ry. Co.* v. *Cooper* (2), should be referred to. In *Great Western Ry. Co.* v. *Solihull Rural Council* (3) a right of walking and taking recreation was claimed for the public over the banks of a reservoir, formed for the supply of the plaintiffs' canal navigation. The right in these cases (*Mulliner's* excepted) was rested on prescription and not on express grant, but the argument, which prevailed, was that the theory of dedication to the public use rests on an implied grant but none could be implied, since even an express grant would have been void as being ultra vires.

Parallel with these decisions there is a line of cases, in which the servitude claimed has been upheld on the ground that a dedication would not under the circumstances have been incompatible with full observance of the terms and full attainment of the purposes for which the statutory powers had been granted. This principle is stated as early as *Rex* v. *Inhabitants of Leake* (4), in which the dedication was upheld, and was acted on in *Grand Junction Canal Co.* v. *Petty* (5), a case of a public right of walking on a towpath, and in *Greenwich Board of Works* v. *Maudslay* (6), a case of a footpath along a sea wall, and was made the ground of the decision against the right in the *Solihull* case (3); cf. *Rochdale Canal Co.* v. *Radcliffe* (7); *Creyke* v. *Corporation of Level of Hatfield Chase.* (8) Parke J. says, in the *Leake* case, that, if the bank was vested in the Commissioners by statute, so that they were thereby bound to use it for some special purpose, incompatible with a public right of walking along it, they must be deemed to have been incapable in law of thus dedicating their property ; otherwise they were in that regard in the same position as other landowners : and see *Foster* v. *London, Chatham and Dover Ry. Co.* (9) Blackburn J., in the *Greenwich* case (6), says " whatever is inconsistent with its doing its duty as a seawall

(1) [1896] 2 Q. B. 439.
(2) [1924] 1 Ch. 211, 229.
(3) (1902) 86 L. T. 852.
(4) 5 B. & Ad. 469.
(5) (1888) 21 Q. B. D. 273.
(6) (1870) L. R. 5 Q. B. 397.
(7) (1852) 18 Q. B. 287.
(8) (1896) 12 Times L. R. 383.
(9) [1895] 1 Q. B. 711.

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cannot stand." Warrington L.J., in *Cooper's* case (1), where a private level crossing was claimed, sums up the rule by saying, that a statutory company has no power to grant any easement, unless expressly or impliedly authorized, but that its inability in this respect is confined to the granting of easements, the enjoyment of which is incompatible or inconsistent with the employment of the land for the statutory purposes for which it was acquired. In the *Grand Junction* case (2), Lindley L.J. says, that such incompatibility is a matter of evidence, and, in practice, evidence has regularly been given and considered for the purpose of testing the question.

My Lords, I do not think that these cases assist the appellants in any way, but in most respects are against them, for they show that, in default of proof of incompatibility in the present case, some other consideration of a cogent kind must be found. The incompetence of the company is only an incompetence sub modo, beyond which the powers necessary to its operation may be freely exercised.

Ayr Harbour Trustees v. *Oswald* (3) introduces a new matter and is nearer to the present case. Harbour trustees, whose statutory power and duty were to acquire land, to be used as need might arise for the construction of works on the coast line of the harbour, sought to save money in respect of severance on the compulsory acquisition of a particular owner's land by offering him a perpetual covenant not to construct their works on the land acquired, so as to cut him off from access to the waters of the harbour, or otherwise to affect him injuriously in respect of land not taken but from which the acquired land was severed. It was held that such a covenant was ultra vires. Lord Blackburn's words should be quoted. "I think," he says, "that where the legislature confer powers on any body to take land compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make

(1) [1924] 1 Ch. 211; 229. (2) (1888) 21 Q. B. D. 273.
(3) 8 App. Cas. 623, 634.

a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good . . . . a contract, purporting to bind them and their successors not to use those powers, is void."

Founding on this case, Russell J. held in *York Corporation* v. *Henry Leetham & Sons* (1) that a contract, terminable only by the customer, to carry his traffic at a fixed annual sum was equally ultra vires. Just as the covenant in the *Ayr Harbour* case (2) tied the hands of the successors to the then trustees, and prevented them from constructing works on the land acquired, however necessary they might have become for the proper management of the undertaking, so he held that the corresponding contracts with Leetham fettered the free management of the canal in perpetuity, no matter how urgent it might be to increase the revenues of the undertaking.

My Lords, I do not think that there is a true analogy between these cases. On examining the facts in the *Ayr Harbour* case (2) it is plain that, in effect, the trustees did not merely propose to covenant in a manner that committed the business of the harbour to restricted lines in the future; they were to forbear, once and for all, to acquire all that the statute intended them to acquire, for, though technically they acquired the whole of the land, they were to sterilize part of their acquisition, so far as the statutory purpose of their undertaking was concerned. This is some distance from a mere contract entered into with regard to trading profits. The land itself was affected in favour of the former owner in the *Ayr* case just as a towpath is affected in favour of the owner of a dominant tenement, if he is given a personal right of walking along it. If the Ayr trustees had reduced the acquisition price by covenanting with the respondent for a perpetual right to moor his barges, free of tolls, at any wharf they might construct on the water front of the land acquired, the decision might, and I think would, have been different.

There is, however, another aspect of the *Ayr Harbour*

(1) [1924] 1 Ch. 557. (2) 8 App. Cas. 623.

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case (1) which ought to be loyally recognized. It is certainly some ground for saying that there may be cases where the question of competence to contract does not depend on a proved incompatibility between the statutory purposes and the user, which is granted or renounced, but is established by the very nature of the grants or the contract itself. It was not proved in the *Ayr* case that there was any actual incompatibility between the general purposes of the undertaking and the arrangement by which the particular proprietor was to be spared a particular interference with the amenities or the advantages of his back land. I think the case was supposed to speak for itself and that, in effect, the trustees were held to have renounced a part of their statutory birthright. The appellants, however, contend, and Russell J. appears to have thought, that your Lordships' House extended other principles, namely, those applicable to servitudes over land acquired, to mere contracts restricting the undertakers' future freedom of action in respect to the business management of their undertaking. This point of view ought therefore to be examined.

The appellants, as I understand them, say that the doctrine is not confined to the creation of servitudes or other derogations by grant from plenary ownership, but extends also to such covenants in perpetuity as may, in events not actually impossible, starve their undertaking and spell its ruin. Southport, they say, now standing in the shoes of the Birkdale Council as well as in its own (if I may somewhat distort their metaphor), has behind it the pockets of the ratepayers of both areas, and though these may be no more inexhaustible than their patience, at least they may prove deeper and more enduring than the paid-up or uncalled capital of the appellant company, or its shareholders' willingness to subscribe to new issues of debentures or of preference stock. The thing speaks for itself. The covenant is fraught with potential suicide for the covenantors, and so is ultra vires.

My Lords, this hypothesis is conceivable, though neither from the evidence nor the argument have I gathered why

(1) 8 App. Cas. 623.

these machinations should be attributed to the respondents or be tolerated by their outraged ratepayers. Municipal finance is capable of much curious development, but I think that among ordinary ratepayers a passion to supply current below cost price to private consumers is purely academic. If it exists at Southport, I think it should be proved by testimony.

The argument must be either that it is one of the direct statutory objects of the Electric Lighting Order that the undertakers should make a profit or at least not suffer any loss, or else that this is an indirect statutory object, since, if the undertakers make no profit, they will either pursue the undertaking without zeal or will drop it, so soon as this imaginary rate-war exhausts their resources.

My Lords, I am afraid this is beyond me. It may be the policy of the Electric Lighting Acts to get trading companies to take up and work Electric Lighting Orders in hope of gain, but I cannot see that it is any part of the direct purposes of the Order, that money should be made or dividends distributed. The primary object of the Electric Lighting Order was to get a supply of electric energy for the area in question, a thing only feasible at the time by getting a trading company to undertake the business. It was not to secure that certain charges should be made or that certain results should be shown upon a profit and loss account. As for the indirect effect, which will follow if no money is made or enough money is lost, the Order itself imposes a maximum price for the current and conceivably, therefore, might itself lead to the exhaustion of the company's funds. How, then, can it be part of the legal objects of the grant of these powers, that they should never result in financial disaster? The Order is really as little concerned with the company's ultimate ability to continue the undertaking as with its earning of a profit. The latter is the company's own affair; the former will simply lead to the revocation of the Order and the grant of a more favourable one to some one else. If this is so, there is a wide and more than sufficient difference between the contract of the Ayr Harbour Trustees not to acquire all

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that they were intended to acquire, and that of the appellants to obtain the transfer of the Order by covenanting among other considerations for something, which obviously is not, and may never be, incompatible with the fulfilment of all the purposes of the Order and most of the purposes of the company's trading as well.

In *York Corporation* v. *Henry Leetham & Sons* (1) there were two navigations, both vested in the Corporation of York, which appear to have differed somewhat in their incidents, the Ouse Navigation and the Foss Navigation. The original Act of 1726, which authorized the former, empowered trustees to levy tolls on craft using the navigation when completed, and, for the purpose of constructing the navigation, authorized them to mortgage these prospective tolls and so to raise the necessary capital. The resources of the trustees were therefore of a character wholly different from those of a limited liability company. A later Act, that of 1732, fixed a schedule of rates and provided that all commodities carried "shall" bear them, and that it should be lawful for the trustees to take the rates "by this Act directed and no others," though, if the full revenue derived from these rates proved to be more than was required to maintain the undertaking, there was power to moderate them. The Act, which authorized the latter navigation, provided for the incorporation of a company having a capital of 25,400*l.* in 100*l.* shares and borrowing powers up to 10,000*l.* No distinction appears, from the judgment of Russell J., to have been drawn in argument between these two undertakings, but it is possible that the agreement in dispute, by which the undertakers compounded the rates with a particular customer, might be regarded as a direct breach of the mandatory charging clause of the Ouse Act of 1732, and consequently ultra vires. The same view could not arise on the Foss Act. The ratio decidendi of the judgment, however, proceeds entirely on the analogy of the *Ayr Harbour* case. (2)

My Lords, with all respect to the learned judge, I am unable to adopt this reasoning. As I have said, it is no part

(1) [1924] 1 Ch. 557. (2) 8 App. Cas. 623.

of the intention of the Legislature that the appellants should make a profit or avoid a loss. If, again, the agreement is to be ultra vires at all, it must be ultra vires all through. In cases like the *Ayr Harbour* case (1) the land acquired under statutory powers was fettered in the undertakers' hands from the time the agreement was made. In the present case the company's activities have not yet been and may never be impaired by the agreement at all. So far it may have been and probably has been safe and beneficial. How, then, can it have been ultra vires hitherto ? There is further, in my opinion, a wide distinction between the position of the appellants and of such undertakers as the Ayr Harbour Trustees. The scheme here is that a limited liability company, not deprived of its right, as such, to go into voluntary liquidation or otherwise to terminate its enterprise, obtained the Order with the Board of Trade's consent and with the like consent may part with it. In other words, the Board of Trade is here the constituted authority, by whose discretionary intervention the supply of electricity may be secured in the interest of the locality. This is a very different scheme from a constitution of undertakers, which under the same statute establishes their existence, confers their powers, and defines their purposes.

It appears to me that no line can be drawn between the agreement now in question and any ordinary trading contract, if the appellants are right in testing the validity of the contract by its ultimate and theoretic possibility of bringing upon them a crippling loss. I do not think that a speculation as to the possible effect of what they have done is a legitimate ground for relieving them from their bargain, and it seems to me that the appeal should be dismissed.

LORD WRENBURY (read by LORD CARSON). My Lords, I concur. I desire to add two observations.

The first is as to *York Corporation* v. *Henry Leetham & Sons.* (2) There was there a contract between those who controlled the statutory undertaking and a third party as to the price to

(1) 8 App. Cas. 623. (2) [1924] 1 Ch. 557.

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be charged. There is no such contract here. The contract is only between the District Council and the company which is taking a transfer of the undertaking.

The second is this: If there had been no transfer of the undertaking a resolution by the District Council in the terms of art. 4 of the second deed of December 31, 1901, would, I conceive, have been intra vires. It would have been a determination of price to be charged which they could revoke or alter if they wished. It would have been no fetter but only a determination as to the amount of the charge they thought proper to make at the moment and which they could alter if they so thought fit.

In fact, art. 4 does no more than contractually determine the amount of the charge. If the transferee found the restriction oppressive and came to the District Council asking to be released from the contractual fetter which existed as between them and as between them only, it would have been competent, I conceive, to the District Council to agree. There was no permanent fetter which put an end to the statutory right in this matter.

LORD CARSON. My Lords, I concur.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, Feb. 12, 1926.

Solicitor for the appellants: *Sydney Morse.*

Solicitors for the respondents: *Sharpe, Pritchard & Co., for J. Ernest Jarratt, Southport.*

[HOUSE OF LORDS.]

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March 15.

WILSONS AND CLYDE COAL COMPANY, LIMITED . . . . . } APPELLANTS;

AND

M'FERRIN . . . . . RESPONDENT.

KERR OR M'AULAY AND ANOTHER . . APPELLANT;

AND

JAMES DUNLOP AND COMPANY, LIMITED . . . . . } RESPONDENTS.

Workmen's Compensation—Arising out of and in Course of Employment—Miner—Breach of statutory Regulation—Miner arrogating to himself Duty of Shot Firer—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1—*Workmen's Compensation Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 42), *s.* 7.

Sect. 7 of the Workmen's Compensation Act, 1923, does not apply to the case of a workman who arrogates to himself duties which he was neither engaged nor entitled to perform, whether the act which causes the injury is the subject of a specific prohibition or not.

A miner, in the mistaken belief that a shot which he had fired had exploded, returned to the shot-hole, to see what the effect of the shot had been, within the period during which all persons were prohibited by statutory regulation from approaching the shot-hole. The shot exploded, and he was seriously and permanently disabled:—

Held, that s. 7 of the Workmen's Compensation Act, 1923, applied, and that the accident must be deemed to arise out of and in the course of the employment.

Decision of the First Division of the Court of Session in Scotland 1925 S. C. 328 affirmed.

A miner, who was engaged with a fireman and another miner in firing by electricity a series of shots in a mine, after one of the shots had exploded, came from his place of safety and coupled the electric cable to the detonator of the next shot. At the time the fireman was moving the handle of his firing battery, which was still attached to the cable, to free some mechanism which had jammed. The shot exploded, and the man was killed. In coupling the cable to the detonator the miner was in breach of a statutory mining regulation which provided that the person authorized in writing by the manager to fire the shots should himself do the coupling:—

Held, that, as the miner in coupling the cable to the detonator was

* *Present:* VISCOUNT DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD SUMNER, and LORD CARSON.

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arrogating to himself a duty restricted to the authorized shot firer, the accident did not arise out of the employment, and s. 7 of the Act of 1923 did not apply.

Decision of the First Division of the Court of Session in Scotland 1925 S. C. 582 affirmed.

These two appeals, which related to the construction of s. 7 of the Workmen's Compensation Act, 1923, were called on together and were dealt with in one judgment.

WILSONS AND CLYDE COAL COMPANY, LIMITED *v.* M'FERRIN.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland (1) affirming a determination of the Sheriff-substitute of Fife and Kinross in an arbitration under the Workmen's Compensation Acts, 1906 to 1923.

The facts set out in the stated case were as follows :—

On March 26, 1924, the respondent (the claimant) was in the employment of the appellants at their Lethans Colliery. The Coal Mines Act, 1911, and the Explosives in Coal Mines Orders of September 1, 1913, and August 31, 1922 (2), applied to this colliery, and were duly posted in terms of the Act. On this date the respondent, who was a miner, was taking down the coal on a longwall face, which had been undercut by a machine. There were two fellow-workers on his right-hand side and one on his left, all similarly employed. Between the respondent and the worker on his left-hand side, called Hendry, there was a " nose " of coal, and each was working on one side of it to bring it down. The respondent and Hendry each bored a shot-hole, charged and stemmed it, with the object of blowing down the coal, the intention being to fire the shots at piece time. The respondent knew that

(1) 1925 S. C. 328.

(2) The Explosives in Coal Mines Order of August 31, 1922, cl. 1 (so far as material) provides : " The Explosives in Coal Mines Order of the 1st September, 1913, shall be amended by the substitution therein of the following paragraphs for paragraphs (*a*) and (*b*) of Clause 3 of the said Order :

(*a*) The person firing the shot shall not himself approach or allow any other person to approach nor shall any person knowingly approach the shot-hole until an interval has elapsed of not less than ten minutes in the case of shots fired by electricity or by a squib, and not less than an hour in the case of shots fired by other means."

Hendry was preparing a shot. Hendry's shot was ready before the respondent's, and he waited for the respondent to be ready before firing. The distance between the shots was between three and four yards. When the respondent was ready he called "fire," this being his intimation to all in the vicinity that he was going to fire a shot and a warning to them to take shelter. He then lit his strum, and went to a place of safety. When the respondent called "fire," Hendry also called "fire," lit his strum, and went to a place of safety. The road to a place of safety taken by the respondent was different from that taken by Hendry and also different from that taken by the two workers on his right-hand side. After the respondent reached a place of safety a shot went off. He thought it was his shot, waited two or three minutes, and then returned to the place to see what the effect of the shot was. The shot which went off was Hendry's shot. The respondent's shot had, in fact, misfired, and went off in his face when he returned, seriously injuring him. The respondent forgot that Hendry had been preparing to fire a shot at the same time as himself until after his own shot went off and injured him.

With regard to the injury sustained by the respondent the Sheriff-substitute came to the conclusion that it resulted in his serious and permanent disablement, and he awarded compensation to the respondent.

The question for the opinion of the Court was whether there was evidence upon which he was entitled to hold that the respondent sustained personal injury by accident arising out of and in the course of his employment with the appellants.

The First Division of the Court of Session (Lord Cullen, Lord Sands and Lord Constable) answered this question in the affirmative, and adhered to the determination of the Sheriff-substitute.

1926. March 1. *Graham Robertson K.C.* and *Robert J. Wallace* (both of the Scottish Bar) for the appellants. Clause 1 (*a*) of the Explosives in Coal Mines Order of August 31, 1922, which deals with misfiring, is an absolute prohibition against the person who fires the shot returning and an order to him

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to prevent others from approaching, and is also a universal prohibition, inasmuch as it prohibits every one from knowingly approaching the danger zone (in the case of a shot fired otherwise than by electricity or by a squib) for one hour from the time of the misfire. It does not concern modes. There is no permitted or prohibited way of entering the danger zone; the order is absolute and universal. It follows that the danger zone is put outside the employment of the particular colliery concerned wherever a misfire occurs in a case of this description for the space of one hour. Assuming that the proviso to s. 7 of the Act of 1923 is satisfied, still the man must be brought within the scope of his original employment before the section can apply at all. The effect of the Order is to make the danger zone a no man's land from the point of view of employment during the prohibited time: *Davies* v. *Gwauncaegurwen Colliery Co.* (1); *Borley* v. *Ockenden* (2); *Jones* v. *Tarr.* (3)

MacRobert, S.-G. for Scotland, and *J. L. Clyde* (of the Scottish Bar) for the respondent.

[At the conclusion of the argument on behalf of the appellants:—

VISCOUNT DUNEDIN said that their Lordships would hear the next case before calling on counsel for the respondent.]

KERR OR M'AULAY AND ANOTHER *v.* JAMES DUNLOP AND COMPANY, LIMITED.

Appeal from an interlocutor of the First Division of the Court of Session in Scotland (4) recalling the determination of the Sheriff-substitute of Lanarkshire in an arbitration under the Workmen's Compensation Acts.

The appellants claimed compensation as the defendants of Donald M'Aulay.

The facts set forth in the stated case were as follows:—

On March 1, 1924, Donald M'Aulay, a miner in the employment of the respondents in their No. 4 Clyde Colliery, Tolcross, was engaged along with a fireman and another miner, in firing

(1) [1924] 2 K. B. 651.
(2) [1925] 2 K. B. 325.
(3) (1925) 18 B. W. C. C. 356.
(4) 1925 S. C. 582.

by electricity a series of three shots in a stone mine in the said colliery. While the first shot of the series was being fired by the fireman, M'Aulay occupied a place of safety in the travelling road off which the stone mine was being driven, some yards from the mouth of the mine and to the left of it, while the fireman and the other miner occupied a place of safety in the same travelling road, but to the right of the stone mine and not quite so far from the mouth of the mine, but beyond a bend in the travelling road and therefore out of sight both of the entrance to the stone mine and of M'Aulay's place of safety. While the second shot of the series was being fired M'Aulay and the other men occupied approximately the same positions. Almost immediately after the second shot of the series had been fired M'Aulay returned from his place of safety to the stone mine, and coupled up the terminals of the electric cable to the wires leading to the detonator of the shot which was next to be fired. While M'Aulay was so engaged, the fireman, who had fired the shot aforesaid, remained in his place of safety, and was engaged in moving backwards and forwards the handle of his firing battery, which was still attached to the cable, in order to free the mechanism, which had jammed. As soon as M'Aulay coupled up the cable to the detonator the movement of the battery handle by the fireman completed the electric circuit to the detonator, and the charge in the stone mine exploded. Neither the fireman nor a fellow-workman who was with him was aware that M'Aulay had gone back into the stone mine after the previous shot had been fired. M'Aulay sustained such injuries as the result of the explosion that he died on March 5, 1924, in the Royal Infirmary, Glasgow.

It was a breach of the recognized practice of the respondents' colliery, in which practice he had been duly instructed, for M'Aulay to return to the place where a shot had been fired as aforesaid before the fireman, whose duty it was to return first, summoned him. It was a breach of the Explosives in Coal Mines Order of September 1, 1913, para. 2 (*h*) (1), which

(1) The Explosives in Coal Mines Order of September 1, [1913,

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was posted and in force in the respondents' colliery, for M'Aulay to couple up the electric cable to the detonator as aforesaid, and in so doing he arrogated to himself a duty restricted to the fireman in the colliery, which he was not employed to discharge.

On the above facts the Sheriff-substitute found further in fact and in law that, when he coupled up the electric cable to the detonator in the stone mine as aforesaid, M'Aulay did so for the purposes of and in connection with the respondents' trade or business in the sense of s. 7 of the Workmen's Compensation Act, 1923. Accordingly he found in law that the appellants were liable to pay compensation under the Workmen's Compensation Acts to the appellants, and he made an award in their favour.

The questions of law for the opinion of the Court were: (1.) Was there evidence upon which the Sheriff-substitute could competently find that M'Aulay's act of coupling the electric cable to the detonator in the stone mine was an act done by him for the purposes of and in connection with the respondents' trade or business? (2.) On the facts stated was he entitled under s. 7 to hold that the accident to the deceased must be deemed to arise out of and in the course of his employment?

The First Division (the Lord President, Lord Cullen and Lord Sands) answered the first question in the affirmative and the second in the negative, and recalled the determination of the Sheriff-substitute.

1926. March 1, 2. *Craigie Aitchison K.C.* and *D. P. Blades* (both of the Scottish Bar) for the appellants. The question in the appeal is as to the true meaning and effect of s. 7 of the Act of 1923. The arbitrator found for the appellants,

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para. 2 (*h*): "Where shots are fired electrically they shall only be fired by a person authorised in writing by the manager for the purpose. The authorised person . . . . shall himself couple up the cable to the fuze or detonator wires and shall do so before coupling the cable to the firing apparatus. . . . . He shall also himself couple the cable to the firing apparatus. Before doing so, he shall see that all persons in the vicinity have taken proper shelter."

and found in fact that the workman's act, which resulted in his death, was an act done by the workman for the purposes of the employer's trade or business. That finding in fact was not challenged in the Court below, and is not reviewable. The question of law is whether s. 7 qualifies, and, if so, to what extent, the fundamental condition of the employer's liability under the principal Act. That section was intended to have a remedial and enlarging effect. It is, therefore, pertinent to inquire: (1.) What was the state of the law prior to 1923? and (2.) What mischief s. 7 of the 1923 Act was intended to remedy? Ever since the decision in *Plumb* v. *Cobden Flour Mills Co.* (1) the law has not been in doubt. A workman could not recover: (*a*) where he assumed functions or duties that were not part of his employment, or (*b*) where he entered forbidden territory, that is, forbidden by a genuine prohibition. This judicial interpretation, while inevitable upon the terms of the statute, had two results: (*a*) a workman acting bona fide was denied compensation wherever he had overstepped the strict limits of his employment, although his act might be inadvertent and in the utmost good faith; and (*b*) a workman who was guilty of serious and wilful misconduct within the sphere of his employment was in a better position than a workman who was guilty of no misconduct, but, from whatever cause, had overstepped the boundary line. It was with that situation that Parliament intended to deal. The main object of the Legislature being to provide a comprehensive statutory insurance against industrial risks, s. 7 should be given a wide interpretation. The Court below has given too narrow a reading to the section. It was capable of being construed so as to cover the case of a workman arrogating to himself a duty that, strictly speaking, was no part of his employment. The statutory regulation contravened by the workman in the present case was a regulation applicable to his employment. It was an injunction directed to him as a miner, as truly as it was a direction given to the fireman of the mine. Further the Court below has not given due weight to the arbitrator's finding in fact. The finding meant

(1) [1914] A. C. 62.

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that the workman was doing something in relation to the blasting operation which he was employed to do, not in the sense that he was employed to do the particular act, but in the sense that the blasting operation was a joint or composite operation in which he had a share. The case, therefore, was not on all fours with the kind of case in which what the workman does is something which has no relation whatsoever to his own proper work. Here the relation between what the workman did and what he was employed to do was of the most intimate kind. The things were interdependent. The workman did the thing which lay next to his hand. The plain intention of the Legislature was to include the case of the workman who, acting honestly and in good faith, and for the purposes of his employer's trade or business, overstepped the strict ambit of his employment, as well as the case of the workman who invaded a forbidden territory. The appellants' view is strongly supported by the dicta of Atkin L.J. in *Davies* v. *Gwauncaegurwen Colliery Co.* (1)

Carmont K.C. and *Albert Russell* (both of the Scottish Bar) for the respondents.

[At the conclusion of the arguments on behalf of the appellants:—

VISCOUNT DUNEDIN said that their Lordships did not at present desire to hear counsel for the respondents. If in the future they desired to do so they would give them notice.]

1926. March 15. VISCOUNT DUNEDIN. My Lords, in these cases there has been brought before your Lordships for the first time the effect of the provisions of s. 7 of the Workmen's Compensation Act of 1923. In order to approach that question it is necessary to consider for a moment the provisions of the Act of 1906, which was the ruling Act at the time when the Act of 1923 was passed, as those provisions had been interpreted by judicial decision. The right of a workman to obtain compensation for an injury rests fundamentally on the words of s. 1 of the Act of 1906. Injury must have

(1) [1924] 2 K. B. 651, 663.

occurred " arising out of and in the course of his employment." If he makes out the proposition that it did so, he succeeds; if he does not, he fails. Now, it is obvious that one method which the employer resisting a claim had of showing that the injury did not arise out of his employment was to show that the workman was forbidden to do what, in fact, he did, and then came the distinction between the two classes of prohibition, which was laid down in *Plumb's* case (1); prohibitions which did and prohibitions which did not limit the scope of employment. The former class, which limited the scope of employment, if found to apply to the employment, formed a complete answer to the assertion that the accident arose out of the employment.

Now we come to s. 7 of the Act of 1923, which is in these terms: " For the purposes of the principal Act, an accident resulting in the death or serious and permanent disablement of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the workman for the purposes of and in connection with his employer's trade or business."

It was hinted at, rather than argued, that the effect of this section was to sweep away altogether the requirement of s. 1 that the accident should arise out of and in the course of the employment. This is obviously an untenable point. Not only are the opening words of the section " For the purposes of the principal Act," but there is the cogent fact that the section gives no right to compensation at all. All it says is that if its conditions apply, the accident shall be deemed to have arisen out of and in the course of the employment. It leaves the principal Act, and in particular s. 1, to confer the right to compensation. The section contains three alternative conditions for its application and one further proviso, which

(1) [1914] A. C. 62.

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applies equally to all the three alternative conditions. These alternative conditions are as follows :—

(*a*) That at the time of the accident the workman was acting in contravention of any statutory or other regulation relating to his employment.

This meets the case of a rule under the Coal Mines Act, 1911, or any other Act of the same kind, or a general regulation of the mines, which, by specially forbidding a certain act, makes it clear that any one to whom the regulation applies who does the act must be acting outside the scope of his employment.

(*b*) That there is an order of the employer to the same effect.

This deals with a case where the prohibition is not general, but is contained in an actual order given by the employer to the particular workman.

(*c*) When the worker was acting "without instructions."

This is not so clear as (*a*) and (*b*). I take it that it is meant to fit a case where it might be argued that the prohibition was an implied prohibition. If it did not mean that, it would be useless, for it is only something that would, as the law stood, operate to define the limit of scope of employment that is in point. A man might act without orders and yet not be in any way out of the scope of his employment, and in that case there is no mischief to be remedied.

The result of this section is, in my opinion, not doubtful. It does not either repeal or amend the radical provision of the principal Act, that the accident to entitle the workman to compensation must arise out of and in the course of his employment, but it does introduce a far-reaching, though artificial, consideration which prevents a certain class of evidence, available to show that the accident did not arise out of the employment, from being any longer in force.

Now, to show that an accident did not arise out of the man's employment by means of tabling a prohibition which limited the scope of his employment was not the only way of showing that an accident did not arise out of the employment. A more direct and simpler way, when the facts

allowed of it, was to show that what the man was doing was not his employment at all. I believe that while sitting in the Court of Session in the case of *Kerr* v. *Baird & Co.* (1) I happened to be the originator of the phrase which has often been applied since, when I said that a miner who acted as a shot firer was arrogating to himself duties which he was neither engaged, nor entitled, to perform. If that is the case, s. 7 of the Act of 1923 has no application, for the simple reason that its language does not apply to it. It is not that there is a specific prohibition; it is that it is not his employment which he was engaged in. There may be a specific prohibition as well, but that does not alter the case. I venture to quote a sentence from *Plumb's* case. (2) I had quoted a sentence from Lord Loreburn's judgment in the case of *Barnes* v. *Nunnery Colliery Co.* (3): "Nor can you deny him compensation on the ground only that he was injured through breaking the rules. But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment." I then go on to say that the Lord Chancellor there put the test cumulatively, because that fitted the facts of the case in which boys in a mine rode in tubs—a thing which they were not employed to do, and which they had been expressly told that they were not to do, but I continue: "I imagine the proposition is equally true if he had expressed it disjunctively and used the word 'or' instead of 'and also.'"

My Lords, I will now proceed to apply these general remarks to the facts of the two cases before us. In the case of Wilsons the facts were that M'Ferrin was working along with another man called Hendry. They were engaged in bringing down, by means of blasting, a piece of coal which had been undercut. It was a case of ordinary blasting by boring a hole, charging the hole with an explosive, stemming the hole, and then

(1) 1911 S. C. 701. (2) [1914] A. C. 67.
(3) [1912] A. C. 44, 47.

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procuring its ignition by means of lighting a strum, which is what might be described as equivalent to a long piece of touch paper. This operation was one which, by the terms of their employment, they were entitled to perform. After each had bored and stemmed two separate bores they gave each other warning. Each lit his strum, and they retired to a place of safety. One shot exploded. M'Ferrin thought it was his shot, and temporarily forgot that Hendry as well had a shot to go off. After a few minutes he went to examine whether his shot had brought the coal down successfully. As he arrived the shot exploded in his face and partly injured his eyesight. Now, in going back in less than an hour he contravened the provisions of the Explosives in Coal Mines Order of August 31, 1922, which forbids approach to a shot which has missed fire in less than an hour, when the proposed ignition has been by any other method than by electricity or a squib. The facts are really precisely the same as they were in the cases of *Moore* v. *Donnelly* and *Fife Coal Co.* v. *Sharp* (1), but s. 7 obviously applies, and so the arbitrator and the Court of Session held. The only reason for saying that the accident did not arise out of the employment was the reason which was successfully urged in those cases—namely, that the prohibition in the Act of Parliament made it clear that what the workman was doing was not within the scope of his employment, but that is precisely the case for the application of s. 7. The accident is to be deemed to have arisen out of the employment notwithstanding the prohibition.

The only argument adduced by the appellants was this: He argued that because the prohibition was directed not only against the particular workman but against all and sundry, the result was that the neighbourhood of the shot was a territory in which no man could work, and that therefore any person there could not be a person for the purpose of work, and consequently it could not be the employment of the workman. But this is a purely fanciful idea. The fact that other persons were prohibited from going there leaves the prohibition as a fact and the argument precisely where it

(1) [1921] 1 A. C. 329.

was, and it is only the prohibition as it affects the workman that would have prevented him from saying that he was engaged in his work when he went back to his working place. Then comes in s. 7, and prevents that from being effectively said.

The case of M'Aulay is not in the same position. The claim is on behalf of the wife and dependants of a man who was killed. It was sustained by the arbitrator, but rejected by the Court of Session. The facts are these: The deceased (M'Aulay) was engaged along with another miner and with a fireman in blasting a portion of rock in a stone mine in a colliery. In this case the firing was to be done by electricity, hence the presence of the fireman. M'Aulay and the other miner each made ready a bore and charged it. The shots were to be fired separately. This is done by coupling up an electric cable, which goes to the detonator, with another cable which leads to a firing handle. This firing handle controls the battery in the same way as a switch does in ordinary electric lighting. Both charges being ready, the cable was coupled up to the charge which had been arranged for the other man. The fireman and the other miner then retired to one place of safety and M'Aulay to another place of safety, which was round a corner and out of sight of the place to which the fireman and the other miner had retired. The shot was fired. After it had been fired M'Aulay left his place of safety and, without in any way warning the other two men, proceeded to couple up the electric cable to his detonator. In the meantime, the firing handle having at the last shot jammed, the fireman, still in his place of safety, began to move it backward and forward to get rid of the jamming. The result was that the moment M'Aulay coupled up the cable the electric circuit was completed, the shot exploded in his face and killed him.

The duties of a fireman are regulated by the Coal Mines Order. He has to be specially appointed in writing, is in sole charge of the electric apparatus, and is bound himself to couple the cable to the fuse of the detonator, and to do so before he couples the cable to the firing handle, and this he

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is also personally bound to do. Under these circumstances the learned arbitrator found, as a matter of fact, that the deceased man arrogated to himself the duties of a fireman in the colliery, which he was not employed to discharge, but in respect of s. 7 found in law that the accident arose out of and in the course of the deceased man's employment. That view was disagreed to unanimously by the learned judges of the First Division of the Court of Session.

In accordance with the general views expressed at the beginning of my speech, I think this judgment was right. I read the Explosives Order, not in the sense of finding in it a prohibition, but as defining the duties of the fireman. These are the special duties of the skilled man, and undoubtedly the deceased man was not engaged to perform these duties. He was not a fireman, and was not qualified to undertake a fireman's duty. The learned counsel for the appellants urged that this was an operation which was being conducted by three men, and that, if one did something out of his ordinary appointed task, none the less he was working within the scope of his employment. There might easily be figured cases where such an argument would prevail. In some classes of work a certain interchange would be innocuous. All depends on the facts, but the facts here show undeniably—and so the arbitrator who is the judge of fact has found—that this was not in the proper sense of the word a joint operation. The operation of coupling was the work of a skilled man. The unskilled man had no right to meddle with it, and if he meddled was doing something which he was not engaged to do, so s. 7 of the 1923 Act has, for the reasons given above, no application.

I therefore move your Lordships that both these appeals be dismissed, with costs.

LORD ATKINSON. My Lords, I concur.

LORD SHAW OF DUNFERMLINE. My Lords, in the case of Wilsons and Clyde Coal Company I too concur unreservedly. In the case of M'Aulay my opinion is as follows: I confess that this case is not to my mind altogether free of difficulty.

It is found, as a matter of fact, by the learned arbitrator, that the late Donald M'Aulay, a miner in the respondents' employment, "was engaged along with a fireman and another miner in firing by electricity a series of three shots in a stone mine" in a certain colliery. The second finding is that M'Aulay "coupled up the terminals of the electric cable to the wires leading to the detonators of the shot," and that this act of coupling up caused the explosion which had such unfortunate results.

The argument, which has something to be said for it, is that, even though it was the fireman's duty to do the coupling up, it is out of place to use language such as "usurpation," "arrogation," and the like, to what was in truth a not unnatural assistance by one man to a comrade in a job which was a joint job.

Secondly, it is said that this joint job was employment equally in that sense of the fireman and of M'Aulay, and that s. 7 of the Workmen's Compensation Act, 1923, applied in respect that all that M'Aulay did was in contravention of a prohibition or regulation applicable to his employment. And thirdly, it is said that what was done was—also within the language of that section—"for the purposes of and in connection with the employer's trade or business."

This last point has to be admitted. This is not a case in which M'Aulay forsook the area of his employment for a purpose connected with his own business, his own amusement, or his own convenience. What he did was manifestly and quite honestly to further the progress of the work—that is to say, for the purposes of the employers' business.

I should incline to agree with the other two points mentioned, but for a consideration of the peculiar position of the fireman. I think that the fireman's responsibility was great, that it was separate from that of the other workmen upon the job, and that the duty of coupling up the electric connection was laid specially and alone upon him. Further, it rather appears that not even the fireman would have been allowed to do such a job, unless he were acting under express written

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authority. I so read the "Explosives in Coal Mines Order of September 1, 1903," which in para. 2 (*h*) provides: "Where shots are fired electrically, they shall only be fired by a person authorized in writing by the manager. The authorized person . . . . shall himself couple up the cable to the fuse or detonator wires, and shall do so before coupling the cable to the firing apparatus. . . . . He shall also himself couple the cable to the firing apparatus."

It is agreed that this Order was known.

The argument, however, is that the prescription that the fireman alone should do the coupling up is necessarily a prohibition against the other men doing it, and that accordingly the Act of 1923, which saved the workman's right to compensation even when he had been guilty of a breach of a prohibition, applies to this case. This argument, too, is well worth consideration. I accordingly quote again s. 7 of the Act of 1903. [His Lordship read the section.] The "statutory or other regulation" embraces the Order cited above.

The serious question is: Did that Order relate to M'Aulay's employment? After duly weighing the argument as to a joint job above noted, I am of opinion that the regulation did not relate to M'Aulay's employment. Rather, its publication was an intimation in clear terms that his employment—he not being a fireman—did not, and dare not, include that responsible and specially authorized act or acts with which the fireman alone was charged. It is upon that ground that I base my decision.

My Lords, the regret which might otherwise have accompanied the refusal of this appeal is abated by the consideration which weighed with this House in the case of *Herbert* v. *Fox* (1), in which the judgments dealt with the importance to life and limb as well as to property of the observance of mining regulations. Contravention of these or disobedience to specific duties thereunder might upset that discipline and order without which the protection of the workmen themselves would be taken away.

(1) [1916] 1 A. C. 405.

Herbert v. *Fox* (1) was the case of a workman whose duty was to walk in front of waggons which were moved, and keep a look-out. Instead of doing that, the workman climbed upon the buffer of a moving waggon and fell from it and was run over. The argument was that at the worst this was a mistake, which had been made in the course of the employment. That argument, however, was rejected. If I may be allowed to quote from my own judgment, the answer was as follows (1): "In my view this case is not one of making a mistake, or even doing a wrong, in a mere breach of rules affecting the service. It is outside the scope of the service altogether; and it was that, and that alone, and not the employment, which brought about the special danger from which the man performing the act suffered. I may add, my Lords, that if it were held that this was an accident arising out of the employment, and that compensation was due, then, in my humble opinion, a real and damaging blow would have been delivered at the whole system of safeguards and protections under which, in many industrial employments, so much may be effected for the safety of life and of limb of the workers engaged."

Herbert v. *Fox*, and the reasons such as that just quoted upon which it was founded, were expressly approved by Lord Dunedin in *Bourton* v. *Beauchamp*. (2)

The answer, therefore, to the view that M'Aulay merely overstepped the boundary between his own and his mate's work is that he left the sphere of his own employment and entered the sphere of another man, skilled, responsible, and specially authorized. In doing so he illustrated that very danger which arises from the forsaking of prescribed discipline, the simplest formula for which is that each man should stick to his job. I cannot read the statute as meaning to remove those safeguards and protection to life and limb and property upon which depend that salutary settled order which law and experience have set up. The language of s. 7 of the Act of 1923 will not, in my view, bear that construction.

(1) [1916] 1 A. C. 416.
(2) [1920] A. C. 1001, 1008.

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LORD SUMNER. My Lords, for the reasons given by my noble friend on the Woolsack I concur in both appeals in the motions which are about to be made.

LORD CARSON. My Lords, I also for the same reasons concur.

In each case :—

Interlocutor of the First Division of the Court of Session in Scotland affirmed and appeal dismissed with costs.

Lords' Journals, March 15, 1926.

In the first appeal :—

Agents for the appellants : *Beveridge & Co., for W. T. Craig, Glasgow, and Wallace, Begg & Co., W.S., Edinburgh.*

Agents for the respondent : *Kenneth Brown, Baker, Baker, for Macbeth, Currie & Co., Dunfermline, and Alexander Macbeth & Co., S.S.C., Edinburgh.*

In the second appeal :—

Agents for the appellants : *Boxall & Boxall, for John Cassels, Hamilton, and Erskine Dods & Rhind, S.S.C., Edinburgh.*

Agents for the respondents : *Beveridge & Co., for W. T. Craig, Glasgow, and J. & J. Burness, W.S., Edinburgh.*

[HOUSE OF LORDS.]

COMMISSIONERS OF INLAND REVENUE . . . . . } APPELLANTS;

AND

FISHER'S EXECUTORS . . . . . RESPONDENTS.

H. L. (E.)* 1926 Feb. 26.

Revenue—Super Tax—Assessment—Shareholder—Distribution of Profits in the Form of Debenture Stock—Capital or Income—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 66.

A limited company with large undistributed profits resolved to capitalize part of these profits and to distribute them pro rata among its ordinary shareholders as a bonus in the form of 5 per cent. debenture stock. The stock was duly issued, the conditions providing that the company might redeem the stock after a certain time and in certain events.

The respondents, who had received their due proportion of the above debenture stock, were assessed to super tax under the Finance (1909–10) Act, 1910, for a certain year in respect of their stock:—

Held, that the bonus paid in debenture stock was not income in the hands of the respondents and was therefore not liable to super tax.

Inland Revenue Commissioners v. *Blott* [1921] 2 A. C. 171 discussed and applied.

Decision of the Court of Appeal [1925] 1 K. B. 451 affirmed.

APPEAL from an order of the Court of Appeal reversing an order of Rowlatt J. (1) upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The facts appearing from the case stated are set out in the report of the case before Rowlatt J. and the Court of Appeal.

The respondents were the personal representatives of the Right Reverend G. Fisher deceased, who had been assessed to super tax in the sum of 8250*l.* for the year ending April 5, 1916, in respect of a bonus received by him in the year 1914–15 as a shareholder of the Wearmouth Coal Co., Ld., in the form of debenture stock of the company.

On an appeal by the respondents against the assessment

* *Present:* VISCOUNT CAVE L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD SUMNER.

(1) [1925] 1 K. B. 451.

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the Commissioners held that the bonus was not income in the hands of the recipient and was not therefore liable to income tax.

Rowlatt J. reversed the determination of the Commissioners, but held that the face value of the stock was not necessarily the measure of the tax which the respondents must pay, and remitted the case to the Commissioners for the amount to be assessed.

The Court of Appeal (Pollock M.R., Warrington and Scrutton L.JJ.) reversed the decision of Rowlatt J. and restored the decision of the Special Commissioners.

1926. Jan. 28; Feb. 4. *Sir Douglas Hogg A.-G.* and *Reginald Hills* for the appellants. The debenture stock issued to the testator as a shareholder in the company in payment of his share of the bonus distributed by the company was a valuable security and was money's worth received by him as the fruit of his investment. It was therefore income in his hands. If what is distributed is money's worth it is immaterial that it is not in the form of money: *Tennant* v. *Smith* (1), per Lord Halsbury; *Californian Copper Syndicate* v. *Harris* (2), per Lord Trayner; *Pool* v. *Guardian Investment Trust Co.* (3); *Commissioner of Taxes* v. *Melbourne Trust.* (4) In *Inland Revenue Commissioners* v. *Blott* (5) the company increased its capital and allotted the new shares to its existing shareholders with the result that each shareholder held exactly the same proportional interest in the total assets of the company as before. Here there has been no increase of share capital, but an issue of debenture stock, and the shareholder gets a new and independent right. He gets a promise to pay a definite sum of money at a future date with interest at 5 per cent. in the meantime and a floating charge on the assets of the company to secure that sum. *Blott's* case (5) is therefore distinguishable. And see *Singer* v. *Williams* (6), per Lord Wrenbury.

(1) [1892] A. C. 150, 156.
(2) (1904) 5 Tax Cas. 159, 167.
(3) [1922] 1 K. B. 347.
(4) [1914] A. C. 1001.
(5) [1921] 2 A. C. 171.
(6) [1921] 1 A. C. 41, 59.

[They also referred to *Whitmore* v. *Inland Revenue Commissioners*. (1)]

Clauson K.C. and *Latter K.C.* (with them *Cyril King*) for the respondents. In considering the liability of a subject to pay super tax in respect of any particular receipt the test is whether that receipt came to him in the character of income or capital: *Inland Revenue Commissioners* v. *Burrell*. (2) Here the company has withheld its profits and has stamped them with the character of capital by issuing debentures against them. The shareholder received something which in his hands was capital; he could not claim any money from the company except in certain contingencies. What the shareholders received may be described as debenture capital. The difference between share capital and loan capital is that in the former case there is a statutory fetter on parting with the capital and not in the latter case: *In re Nixon's Navigation Co*. (3) But the reasoning of the majority in *Blott's* case (4) did not proceed upon any difference between share capital and loan capital; it proceeded on the view that the company, as it was legally competent to do, had taken the undivided profits permanently out of the category of income. In this case, as in that, there has been no release by the company of any part of its assets to the shareholder. In principle this case is covered by *Blott's* case (4) and *Bouch* v. *Sproule*. (5)

[They also referred to *Inland Revenue Commissioners* v. *Port of London Authority*. (6)]

Sir Douglas Hogg A.-G. replied.

The House took time for consideration.

Feb. 26. VISCOUNT CAVE L.C. My Lords, at the end of the year 1913 the Wearmouth Coal Co., Ld. (which I will refer to as "the company"), had an issued capital of

(1) Decided by Rowlatt J. Dec. 15, 1925. Tax Leaflet, No. 205.
(2) [1924] 2 K. B. 52.
(3) [1897] 1 Ch. 872.
(4) [1921] 2 A. C. 171, 184, 198–9, 200.
(5) 12 App. Cas. 385, 397, 401, 402–3.
(6) [1923] A. C. 507, 522.

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523,200*l.*, divided into 5 per cent. preference shares and ordinary shares. The books showed a reserve fund of 293,035*l.* 4*s.* 11*d.* and a balance to the credit of profit and loss account of 167,279*l.* 2*s.*; but these sums did not exist in cash or liquid assets, the reserve fund and a considerable part of the credit balance on profit and loss account having been expended in increasing the capital value of the company's property. Early in the year 1914 the directors were minded (as they expressed it) to "effect the capitalization" of 357,500*l.* of these funds by distributing that amount pro rata among the ordinary shareholders in the form of a 5 per cent. debenture stock; but as the creation of a large debenture debt in front of the preference shares might be prejudicial to the holders of those shares, they proposed as part of their scheme that arrangements should be made by which the whole of the preference shares should be acquired by the ordinary shareholders in exchange for a corresponding amount of debenture stock.

These proposals commended themselves to the shareholders of the company, and the steps required for giving effect to them were duly taken. The articles of association of the company were altered by special resolution so as to enable the company in general meeting to pass a resolution for capitalizing the 357,500*l.* and distributing that sum as a bonus among the holders of the ordinary shares in proportion to the amounts paid up on their shares, and so as to enable the directors to issue debenture stock of the company in satisfaction of the bonus. An agreement for the exchange of the preference shares for debenture stock was executed by representatives of the two classes of shares. A resolution for capitalizing and distributing the 357,500*l.* in accordance with the articles as altered was passed by the company in general meeting and approved at a separate meeting of the preference shareholders; and 5 per cent. debenture stock to the amount of 357,500*l.*, secured by a trust deed, was created and issued in accordance with the scheme. The debenture stock trust deed provided that the stock should be a charge on the company's undertaking and on all its property

and assets for the time being, but should become enforceable only if the company should make default in the payment of interest or in the performance of the covenants contained in the deed or in the event of a distress or execution or the appointment of a receiver or on the winding up of the company or a stoppage of its business; but by the conditions of issue the stock was made redeemable at any time after January 1, 1920, by six months' notice to be given by the company. The result of these operations is reflected in the balance sheet of the company for the year 1914, in which the reserve fund of 293,035*l.* 4*s.* 11*d.* and a sum of 64,464*l.* 5*s.* 1*d.* transferred from the profit and loss account are shown as cancelled by 357,500*l.* "bonus distributed July, 1914, in the form of debenture stock."

The late Bishop Fisher held 14,000 5*l.* ordinary shares and 7640 5*l.* preference shares of the company, all these shares being fully paid up except that upon 2400 of the ordinary shares 2*l.* 10*s.* only was paid up. As the result of the transactions which I have shortly described, he became entitled, in July, 1914, to 82,500*l.* of debenture stock of the company, of which 16,540*l.* had to be exchanged for preference shares of a like amount. He was not entitled to receive nor did he receive from the company any payment in cash. He was assessed to super tax for the tax year 1915–16 on the above sum of 82,500*l.* debenture stock as being income received during the preceding tax year; and, Bishop Fisher having died after the assessment, his executors (the present respondents) appealed against the assessment to the Special Commissioners of Income Tax. Those Commissioners held that the bonus paid in debenture stock was not income in the hands of the recipient and was not a ground for assessment to super tax, and they accordingly discharged the assessment, subject to a case which they stated for the opinion of the High Court. On the hearing of the case stated, Rowlatt J. held that the bonus was income (though not necessarily income to the face value of the debenture stock) and was a ground for assessment to super tax, and he remitted the case to the Commissioners to determine the amount of the assessment;

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but on appeal to the Court of Appeal, that Court took the opposite view and restored the decision of the Commissioners. Hence the present appeal.

My Lords, it is impossible for your Lordships to determine the question under appeal except in relation to the previous decision of this House in the case of *Inland Revenue Commissioners* v. *Blott*. (1) In that case a company had capitalized a large sum of undistributed profit and had issued to its shareholders bonus shares to an equivalent amount; and it was decided by a majority of this House, after full argument, that the bonus shares were not income so as to found a claim for super tax. The only material distinction between that case and the present is that, while in *Blott's* case the bonus took the form of paid-up preference shares, in the present case it was in the shape of debenture stock; and, unless that difference renders inapplicable the reasons for the decision in *Blott's* case, the conclusion in this case must be the same.

The ratio decidendi in *Blott's* case must, of course, be sought for in the speeches of the Lords whose opinions prevailed. Lord Haldane stated his view as follows: "My Lords, for the reasons I have given I think that it is, as matter of principle, within the power of an ordinary joint stock company with articles such as those in the case before us to determine conclusively against the whole world whether it will withhold profits it has accumulated from distribution to its shareholders as income, and as an alternative not distribute them at all, but apply them in paying up the capital sums which shareholders electing to take up unissued shares would otherwise have to contribute. If this is done, the money so applied is capital and never becomes profits in the hands of the shareholder at all. What the latter gets is no doubt a valuable thing. But it is a thing in the nature of an extra share certificate in the company. His new shares do not give him an immediate right to a larger amount of the existing assets. These remain where they were. The new shares simply confer a title to a larger proportion of

(1) [1921] 2 A. C. 171, 184, 192, 195.

the surplus assets, if and when a general distribution takes place, as in a winding up. In these assets the undistributed profits now allocated to capital will be included, profits which will be used by the company for its business but henceforth as part of its issued share capital. Such a transaction appears to me to be one purely of internal management, with which, for the reasons explained by Lord Davey in *Burland* v. *Earle* (1), no Court can interfere."

And the noble and learned Lord relied strongly on the previous decision of this House in *Bouch* v. *Sproule* (2), where Lord Watson had said: "In these circumstances it was undoubtedly within the power of the company, by raising new capital to the required amount, to set free the sums thus spent out of the reserve fund and undivided profits for distribution among the shareholders. It was equally within the power of the company to capitalize these sums by issuing new shares against them to its members in proportion to their several interests."

Lord Finlay expressed his conclusion as follows: "The general scope and effect of these transactions is beyond dispute. There was an increase in the capital of the company by the retention of the amounts available for dividends. . . . . The use of the sums which had been available for dividend to increase capital would enable the company to carry on a larger and more profitable business, which might be expected to yield larger dividends. These dividends, however, were to be in the future. So far as the present was concerned there was no dividend out of the accumulated profits; these were devoted to increasing the capital of the company. The company had power to do what it pleased with any profits which it might make. It might spend the accumulated profits in the improvement of the company's works and buildings and machinery. These improvements might lead to a great accession of business and increase of profits by which every shareholder would benefit, but of course it could not for a moment be contended that such a benefit would render him liable to super tax in respect of it.

(1) [1902] A. C. 83, 93. (2) (1887) 12 App. Cas. 385, 402–3.

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The benefit would not be in the nature of income, and super tax can be levied only on income."

And in a later part of his speech he said: "The second contention of the Crown is that the allotment of the preference shares was equivalent to the payment of the bonus. To appreciate this point it is necessary to consider closely what it was that the shareholder got. Did he get anything in the nature of payment of income? It is obvious that he did not. He gave up any claim to the income. What might have been paid as income went to increase the capital of the company. The shareholder got his proportionate share in the business of the company as increased by the additional capital. The proportion of his share in that business as compared with the proportion of other shareholders was in no way affected by the issue of the preference shares, as all the shareholders alike got them. The benefit, and the sole benefit, which the respondent derived was that the business in which he had a share was a larger one with more capital embarked in it, precisely as might have been the case if the accumulated profits had been applied in the improvement of the company's works and machinery. Instead of his getting any dividend, or anything in the nature of a dividend, the fund which might have been divided was impounded to increase the capital of the business. How is it possible to treat any advantage accruing from this as a payment of income? The case differs toto cœlo from a case in which a dividend is paid not in money but in money's worth by the delivery, say, of goods or of securities."

The securities referred to in the sentence last quoted are of course securities forming part of the company's assets.

In a later case of *Pool* v. *Guardian Investment Trust Co.* (1), where a company had distributed not shares in its own stock but shares of another company in which a part of its reserve was invested, Sankey J., in an interesting judgment, expressed the result of *Bouch* v. *Sproule* (2) and *Blott's* case (3) as follows: "In my view the true test as to whether a

(1) [1922] 1 K. B. 347, 357. (2) 12 App. Cas. 385.
(3) [1921] 2 A. C. 171.

distribution of shares falls to be taxed depends upon two questions: (1.) Whether there has been a release of assets; (2.) if so, whether the assets released were capital or income"; and he held—and (I think) rightly held—that in that case there had been a release of assets as income upon which a claim for super tax could be based.

My Lords, if the tests which are to be found in these judgments are applied to the transactions now in question, I think that it will be found impossible to escape from the conclusion that the issue of debenture stock in the present case falls within the same category as the issue of shares in *Blott's* case. (1) Here, as in that case, the fund representing reserve and accumulated profits was at the disposal of the company, which could determine as against the whole world whether that fund should be distributed to the shareholders as income or should be retained and applied to capital purposes. It is true that in this case the reserve could not (as the articles stood) be distributed except under the authority of a special resolution, but such a resolution could have been passed. It is true also that all or the greater part of the fund had been expended in increasing the value of the company's property; but that difficulty could have been surmounted by borrowing an equivalent sum for distribution. The company was, therefore, master of the situation, and it elected definitely and irrevocably not to distribute the fund as income, but to impound and apply it as income-producing capital; and that election, if made (as I do not doubt that it was made) in good faith, was binding on the shareholders and could not be questioned by the Crown. No doubt, the shareholders got debenture stock which, like the shares in *Blott's* case (1), was a valuable thing; but they had no power to call in the stock, which gave them no present right to receive any part of the company's assets either in money or in money's worth, but only entitled them to a sum to be carved out of those assets if and when the stock was paid off. It is true that debenture stock, unlike shares, creates a debt; but the debt in this case was not presently payable and may never

(1) [1921] 2 A. C. 171.

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become payable while the company is in existence. The whole transaction was "bare machinery" for capitalizing profits and involved no release of assets either as income or as capital. Upon the whole, I think that this case is covered by the decision in *Blott's* case (1), and that in this case, as in that, the person sought to be charged had received no income upon which he could be charged with super tax in the succeeding year.

For these reasons I am of opinion that the appeal fails, and I move your Lordships that it be dismissed with costs.

LORD ATKINSON: My Lords, I concur.

LORD SHAW OF DUNFERMLINE. My Lords, in view of the judgment just delivered by my noble and learned friend on the Woolsack, it is quite unnecessary for me to repeat at length the narrative of the facts of this case or to make again a citation of the provisions of the statutes relative thereto and the decisions of this House thereon.

Only a word is required to show how the question arises. In the year 1913, the Wearmouth Coal Co. showed by their balance sheet that there was standing to the credit of profit and loss account plus a reserve fund and a certain suspense account a sum in all of 357,500*l*. That the whole of it, or any portion of it, could have been, at the will of the directors of the company, distributed among the shareholders as dividend, there is, of course, no question; and, to the extent to which it was so distributed, it is undoubted that the dividend received would have been treated as income under the Income Tax Acts. The directors of the company and the shareholders were agreed, however, upon a different course of policy. The necessary steps were taken "to effect the capitalization of 357,500*l*. of these reserve funds by distributing this amount pro rata among the ordinary shareholders in the form of 5 per cent. debenture stock."

The respondent in this appeal was a large shareholder. It was intimated to him that his "proportion of the bonus

(1) [1921] 2 A. C. 171.

was 82,000*l.*, in respect of which he was to receive . . . . debenture stock, amounting to 65,960*l.* and . . . . preference shares of 5*l.* each, of the total nominal value of 16,540*l.*, together amounting to 82,500*l.*"

This 82,500*l.*, it is agreed by the parties, arose from the profits earned by the company in which the respondent was a shareholder. The effect of the transaction was without doubt to tie up this amount of profit which might have been given to the respondent in cash—to tie it up in the hands of the company either as preference shares or as debenture stock not realizable for a period of at least six years. The sum, therefore, which might have been paid in cash as income was devoted to capitalization, and accordingly the sum was not only not paid away, but was excluded from any income fund.

There are two views of this transaction. The first view on the side of its economics is that the nature of the transaction shows that it was to all intents and purposes equivalent to a distribution of dividend in cash by the company and a receipt of income by the shareholder. It is agreed that, so far as figures are concerned, this is so. It is further manifest that by this system of finance—continued from year to year—it would be possible, by the exercise of dexterity on the part of company directors and acquiescence on the part of shareholders, to add to each individual shareholder's capital interest in the company, so that in course of time such shareholder would find himself increasingly wealthy, the increments to his assets arising out of annual profit, and yet would be able to escape from the payment of that super tax which he would have contributed to the revenues of the nation had the distribution of the profits been made by the company in cash.

This, according to the view presented, is contrary to the spirit of the Income Tax Acts, and is in defeat of the express prescription that the taxpayer shall state an account of his income received from all sources. Out of profits from year to year he has become wealthier from year to year. And so, it is contended that the true meaning and intent of the Income Tax Acts is that this increment of wealth should be tapped for public uses.

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The other view, and the one which in my humble judgment is sound, is: These things may, to speak generally, be very true, but they are not for the consideration of the judiciary; they may demand or require the attention of the executive and of the Legislature, but the task of the judiciary is simply to comply, not with the law as it ought to be, but with the law as it is, and it is that law alone which forms the prescription for the decision of the case here stated. In that prescription note must be taken of and loyalty given to the decisions of this House; otherwise, neither the Crown nor the subject would ever know where they were.

Further, even upon the side of figures, as stated, it is by no means clear that the idea of income or the enjoyment of income applies to the facts of such a case as the present. The company, before the operation of distribution of bonus per issue of debenture stock took place, stood in possession of so much capital, with so much accumulation and reserve. In a commercial and economic sense these accumulations of profit and reserve did add, and add largely, to the value of each share in the company. When these were swept away, the value of each share subject to ordinary market contingencies would be economically pro tanto reduced. That reduction of each shareholder's capital value in the market was, however, recouped to him by the issue of debenture stock. He then stood in possession of a pro rata share of the capital stock of the company which, added to his original shares, though these were now reduced in value, left him at the end of the transaction as nearly as possible where he was in matter of finance before the transaction began.

Upon the legal side of the matter it must not be forgotten that all the necessary resolutions, confirmations, new articles of association, etc., required to regularize the transaction have been carried through. It is a transaction in itself unassailable in law. The result of it was to negate emphatically the idea of distribution to shareholders as income; on the contrary, it was to withdraw from each shareholder the sum which might have been given to him as income and to withdraw it definitely from an income fund.

It was stamped as a capitalization transaction. Such a transaction was within the power of the shareholders of the company, and all, including the Crown, are bound by that. It is incorrect in principle to attempt to get behind that transaction, legal and competent and regular in form, and to endeavour to construct a canon of liability to income tax out of conjecture as to the motive or scheme for the defeat of the revenue which underlay its various stages. The money so capitalized could not pass to a tenant for life. If the company were wound up, the whole would still be treated as its existing assets.

My Lords, I have thus stated the two views, in order, in a single word, to say that I think that this House is precluded by the authority of *Blott* (1), following the case of *Sproule* (2), from adopting the view first expressed, and is bound to follow that view which I have just sketched in the latter portion of my address.

It is needless to repeat again the emphatic declarations in both these cases which show the soundness of the various heads for consideration which I have just enumerated. I also conclude that the Crown fails in its attempt to make any distinction in principle between the facts of *Blott's* case (1) and those of the present appeal.

The administrative or financial questions underlying your Lordships' decision are for consideration, as I have said, by the executive and the Legislature, but cannot control the loyalty which we must pay to the text of the statutes and the judicial interpretations thereof.

LORD SUMNER. My Lords, the authority of *Blott's* case (1) constrains your Lordships to dismiss this appeal, but, as I regret the necessity for this conclusion, perhaps I may venture to state how it is that, in my view, in spite of considerable differences of fact between the two cases, the result must, nevertheless, be the same.

Shortly stated, I understand that *Blott's* case (1) was decided on this principle. To attract super tax to a bonus

(1) [1921] 2 A. C. 171. (2) 12 App. Cas. 385.

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distributed to him by a company in which he is a shareholder, what reaches the taxpayer must at that moment bear the character of income, impressed upon it by the company which distributes it and by it alone. Provided that the company violates no statute and also keeps within its articles, it can call the subject matter of the distribution what it likes, and, I think, this involves the corollary, that it can either call it by a new name or simply discard its old one. After all, it is natural for the creature to be named by its creator. Further, what the company says it is, that it is as against all the world. What the company says it shall no longer be, that it is no longer for any purpose. How this is effected and by what resolutions, confirmations, and instruments does not matter, for such things are "bare machinery." In what the company has said and done is found the answer to the question: What has the subject matter of the distribution now become or ceased to be, when first it reaches the taxpayer? (See Viscount Haldane, pp. 182, 184, 188, and Viscount Finlay, pp. 194, 196, 197 of [1921] 2 A. C.) Transmuted by this alchemy, profits in hard-earned gold became extra share-certificates, and yet the shareholders, who receive them, may be greatly the gainers.

Both cases are alike in the following respects. In both the company had among its assets considerable amounts of undivided profits, and its board proposed to distribute among its shareholders shares or stock of an aggregate face value corresponding to the amount of the undivided profits, which were to be dealt with. The company passed a resolution to distribute a bonus in the form in the one case of preference shares, part of an authorized but as yet unissued amount, and in the other of debenture stock, newly created for the purpose. In the former case the shares were to be credited as fully paid and, as between the company and the shareholders, the shares distributed carried no liability for calls, but enjoyed a full right of participation upon the footing that they were paid up. In truth, however, nothing was paid up on the shares, though alterations in the books and balance sheet were made as required. In the latter case the

company executed a trust deed, by which a large indebtedness was acknowledged to exist, that in truth was purely voluntary, for the company had borrowed nothing and owed nothing to the trustees, and the deed included a covenant to pay off that indebtedness at a future time. To authorize the creation of this stock an amendment had to be made in arts. 42 and 43. Under the heading " Borrowing powers " these were originally directed to borrowing money and to securing money borrowed. By this amendment they were extended to securing the payment of sums of money and securing the repayment by an issue of debenture stock. I assume, without deciding, that this amendment authorized what was done, since the Crown has not contested the point, though, even after the amendment, borrowing continues to be the salient and perhaps the pervading feature of the articles. In neither case were any assets " released " : *Pool's* case (1) ; they remained in the business just as before. In each case the advantage, which the company got by what was done, was simply this, that money, which might have been distributed at any time as dividend under ordinary resolutions, declaring a dividend and authorizing its payment, could no longer be dispersed in this simple way, but, if at all, only by more complicated resolutions duly passed by the shareholders, and in *Blott's* case probably involving liquidation. Were there an antagonism in interest between a company and its shareholders, there might be some intrinsic advantage in such a change, but otherwise the object of it must in *Blott's* case (2) be sought in some conflict of view between different bodies of shareholders as to the extent of the conservation of assets to be adopted by the company and in the present case also in some private liability affecting some of the shareholders, but not the company. As a matter of fact, if the sum, in respect of which the debenture stock was issued in this case, had been distributed as cash dividends, nearly the whole of the ordinary shareholders would have been chargeable with super tax in the following year and some of them in large amounts. To the company this

(1) [1922] 1 K. B. 347, 357.
(2) [1921] 2 A. C. 171.

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mattered nothing, but I cannot think it was lost sight of in the transactions in question.

In both cases the resolution, with which the transaction began, spoke of "capitalizing" the undivided profits and distributing the sum dealt with as a "bonus," and in both cases the use of the word "dividend" was carefully avoided. It was submitted to your Lordships, as the essence of the decision in *Blott's* case (1), that assets, consisting of profits earned but not divided, were to be turned into authorized share capital, and that, if so, the decision would not apply in the present case, where no alteration was made in the share capital. I am unable to accept the first reply suggested by the respondents, that the sum actually was turned into capital —namely, loan capital, since it is clear that no such addition to effective capital, as arises when a company borrows a large sum on the security of its assets, was brought into existence at all, and I do not myself think that debts or promises to pay form part of capital, though some debtors do. The second reply was very different—namely, that it was natural to speak of "capitalizing" and "converting" into capital in *Blott's* case (1), for there a purported "capitalization" took place, but these expressions ought not to be read as limiting the ratio decidendi to cases where new paid-up capital is created in the strict sense of the word. The real application of the principle is to assets, from which any further character of divisible profits has been taken away, whatever may be the substituted character thereafter impressed upon them. If so, that principle applies here. My Lords, for my part I think this argument is right, and to hold otherwise would be disloyal to the former decision of your Lordships' House.

There are also expressions in *Bouch* v. *Sproule* (2) and in *Blott's* case (1) which direct attention to the "substance" of the company's transaction, but I do not think these affect the present appeal either. Lord Herschell (12 App. Cas. at p. 398) speaks of looking at "both the substance and the form"; so does Lord Finlay in *Blott's* case ([1921] 2 A. C. at p. 198).

(1) [1921] 2 A. C. 171. (2) 12 App. Cas. 385.

Lord Cave, on the other hand, uses the expression ([1921] 2 A. C. at p. 201) "if the substance and not the form of the transaction is looked to. . . . ." In both cases, however, both the form and substance were fully considered. Not only were the deeds and resolutions construed but the scheme of the transaction, its financial results, and the supposed desires and intentions of the company were examined. Lord Finlay speaks of the option, which was given to the shareholder in *Bouch* v. *Sproule*, as one which should be ignored, because it was merely formal ([1921] 2 A. C. at p. 198). Lord Cave speaks of that option, as at least so substantial that it might make a difference, and as a feature not occurring in *Blott's* case (p. 202). In spite, however, of these discussions and divergences all the noble and learned Lords, who formed the majority, refused to be influenced by the fact that to call the shares "paid up" was formally untrue, on the ground that the form of transferring the required sum from the category of undivided profits to that of paid-up share capital had been correctly gone through in accordance with the articles.

Accordingly I think the present case cannot be distinguished on this ground. The proposition, that the substance of a transaction must be looked to and not merely the form, is generally invoked against those who have carried it out. I think it is unusual, where the form of a transaction is against those, whose transaction it is, to invoke the substance in their favour, in order to eke out what they have left defective in form. Sometimes again it is the "intention" of the company that is said to be dominant: *Burrell's* case ([1924] 2 K. B. at p. 68); sometimes it is what the company "desired" to do ([1921] 2 A. C. at p. 200). In any case desires and intentions are things of which a company is incapable. These are the mental operations of its shareholders and officers. The only intention, that the company has, is such as is expressed in or necessarily follows from its proceedings. It is hardly a paradox to say that the form of a company's resolutions and instruments is their substance. At any rate, in the present case, there is no need to distinguish between form and substance

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in the transaction itself or to refer to desires or intentions, further than to examine what was done, for everything was carried out in plain terms and without concealment. What the requisite majorities of the shareholders desired and intended is pretty plain too, but that is another matter.

Equally must the Crown fail in its contention that the shareholder is taxable, because at any rate the company distributed money's worth—namely, debenture stock that could be sold. The point was before the House in *Blott's* case. Lord Haldane (p. 184) said that the share distributed to the shareholder was " valuable " and Lord Finlay (p. 196) that it was " valueless," but this difference of opinion made no difference in their conclusion. Lord Cave (p. 199) expressly deals with it, saying, that the shareholder no doubt got something which he could sell, but if he did so he would be selling a capital asset, producing income (p. 200). The fact is that money's worth is not a material circumstance, until the bonus distributed has been shown, when still in the company's hands and at the time of distribution, to be impressed with the character of income of the company. If it is not, the bonus does not attract tax as part of the super-tax payer's income, even though he spends it, when he gets it, exactly as he spends his taxable income.

My Lords, the highest authorities have always recognized that the subject is entitled so to arrange his affairs as not to attract taxes imposed by the Crown, so far as he can do so within the law, and that he may legitimately claim the advantage of any express terms or of any omissions that he can find in his favour in taxing Acts. In so doing he neither comes under liability nor incurs blame. It may be a question, however, whether these considerations of justice and public policy apply equally to a limited liability company, a creature of the law strictly controlled by statute, in a case where it has no interest in either payment of or escape from a tax that is not levied upon it. In this case, a sum of 64,464*l.* 5*s.*, part of the profits of the current year 1914, has been dealt with apart from the undivided accumulations, an amount sufficient in itself to have paid a dividend on the issued

ordinary shares of 25 per cent., or 5*s.* in the pound for every pound paid up, and by the use of " mere machinery " it has been converted into debenture stock, not redeemable under normal circumstances for six years certain. This is valid as against all the world, because *Bouch* v. *Sproule* (1) now applies to revenue cases and because, under *Blott's* case (2), the mere decision of the company, operating through voting majorities whose private motives and interests may have been no concern of the company at all, has this effect. If any part of the dividends of the year can be so converted, I presume all could be, nor, if a six years' currency of the debenture stock is permissible, do I see why six weeks should be less so. How far this position is tolerable is, however, a matter for the Legislature. It is not material here, but I think it may well be doubted whether, in the long run, it should be permissible for a limited liability company to create obligations, for which no consideration has been given to it, or to increase its paid-up share capital out of its own assets without imposing on the holders of this additional share capital the usual obligations, which are involved in the subscription of shares.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, Feb. 26, 1926.

Solicitor for the appellants : *Solicitor of Inland Revenue.*

Solicitors for the respondents : *Rawle, Johnstone & Co., for Cooper & Jackson, Newcastle-upon-Tyne.*

(1) 12 App. Cas. 385. (2) [1921] 2 A. C. 171.

[HOUSE OF LORDS.]

H. L. (Sc.)* 1926 March 26.

KIMBER COAL COMPANY, LIMITED . APPELLANTS;

AND

STONE AND ROLFE, LIMITED . . . RESPONDENTS.

Shipping—Charterparty—Demurrage—Principal and Agent—Signature by Agent "for" named Charterers—Printed Form—Written Clause that Demurrage should be paid by named Agent—Personal Liability of Agent.

The owners of a chartered ship sued the K. Coal Co. in the Sheriff Court for demurrage at the port of loading under a charterparty expressed to be entered into "between G. T. G. & Co., owners' agents, and A. B. Co., Copenhagen, charterers." The charterparty, which was on a printed form, provided for payment of demurrage by "the charterers," and at the end of the charterparty the following stipulation was added in writing: "Freight and demurrage (if any in loading) to be paid in Glasgow by the K. Coal Co., Ltd." The charterparty was signed as follows: "For the A. B. Co., Copenhagen, J. B. J., of the K. Coal Co., Ltd. For and by telegraphic authority of owners, for G. T. G. & Co., J. M., as agents only." It was admitted that J. B. J. signed on behalf of the K. Coal Co.:—

Held (1.), that the K. Coal Co. were not by reason of the form of the signature made liable upon the charterparty; (2.) that the clause in writing did not import a promise of liability sufficient to rebut any inference to the contrary from the form of the signature.

Decision of the First Division of the Court of Session in Scotland reversed.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland.

The respondents were the owners of the steamship *Allie* and the appellants were coal merchants of Glasgow.

The respondents raised an action in the Sheriff Court of Lanarkshire against the appellants under a charterparty dated June 10, 1920, for 335*l.* odd for demurrage at Grangemouth, the port of loading.

The charterparty was expressed to be entered into "between Messrs. G. T. Gillie & Co. owners agents of the good screw steamer called the *Allie* . . . . and Atlantic Baltic Co., Copenhagen, charterers." The charterparty was embodied in a printed form, and the word "charterers" was

* *Present:* VISCOUNT DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD SUMNER, and LORD CARSON.

used throughout as denoting the Atlantic Baltic Co. At the end of the charterparty there was inserted in manuscript the following stipulation, "Freight and demurrage (if any in loading) to be paid in Glasgow by the Kimber Coal Company."

The charterparty was signed as follows: "For the Atlantic Baltic Co., Copenhagen, J. B. Jamieson, of the Kimber Coal Co., Limited.

For and by telegraphic authority of owners, for G. T. Gillie & Co., J. Mathieson, as agents only."

It was admitted that J. B. Jamieson signed the charterparty on behalf of the appellants. By the terms of the charterparty (cl. 2) the vessel was to proceed to Grangemouth and there load a full cargo of coal (cl. 5); the cargo to be loaded in 100 running hours; and (cl. 6) if the steamer were detained beyond her loading time "the charterers" to pay demurrage at the rate of 1*s.* 6*d.* per gross registered ton per running day.

The loading of the vessel at Grangemouth was completed on August 6, 1920.

The vessel was admittedly on demurrage, and the only question at issue was as to the personal liability of the appellants.

The Sheriff-substitute, the Sheriff, and the First Division of the Court of Session (the Lord President, Lord Skerrington, Lord Cullen and Lord Sands) all agreed in holding that under the terms of the charterparty the appellants were personally liable for the demurrage.

But upon a further question, whether the appellants by their subsequent conduct had made themselves liable to pay demurrage independently of the terms of the charterparty, the Courts below were not wholly agreed.

This appeal is not fully reported upon this point, the House being of opinion that the respondents' case, based on the subsequent conduct of the appellants, failed on the evidence.

The interlocutor of the First Division recalled the interlocutors of the Sheriff and Sheriff-substitute, and, after

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referring to the manuscript clause and the signature of the charterparty, found in fact that in the correspondence and actings of the parties subsequent to the date of the said charterparty the parties wrote and acted on the footing that the defenders were personally liable for implement of the said clause, and found in law that under the said charterparty the defenders were personally liable for the demurrage.

1926. March 8, 9. *Craigie Aitchison K.C.* (of the Scottish Bar) (with him *J. G. Thorn* (of the Scottish Bar) and *G. Russell Vick* (of the English Bar)) for the appellants. There being here a named principal, the rule of law that when an agent acts for a named principal he binds the principal and not himself applies. To sign "for" a person is equivalent to signing "on behalf of," and signing for or on behalf of is the same thing as signing as agent: *Ariadne Steamship Co.* v. *James McKelvie & Co.* (1) That case was affirmed by this House sub nom. *Universal Steam Navigation* v. *James McKelvie & Co.* (2), and it completely covers the present case. In construing a charterparty the dominating consideration is: Is there a qualification attached to the signature or is there not? If there is, that applies to every part of the contract. The respondents must say that the signature is to be read in a double sense. That argument is disposed of by Lord Shaw in the *Ariadne* case. He says: "A third view is suggested—namely, that [the respondents] were ex concessu agents, but yet were principals over and above. This answers itself. Such a confused and unusual situation would require the clearest words to make it intelligible and effective." To attribute a double character to a signature and to attribute one character to one part of the contract and another character to another part of the contract would lead to confusion in the construction of mercantile documents. Of course the agent might sign as agent and also for himself, but that has not been done. *Gadd* v. *Houghton* (3) is a strong decision in the appellants'

(1) [1922] 1 K. B. 518, 535. 499, 501.
(2) [1923] A. C. 492, 495, 498, (3) (1876) 1 Ex. D. 357, 360, 361.

favour, because there the signature was without qualification. The manuscript clause is not apt to describe personal liability: cf. cl. 6 of the charterparty. The natural meaning is that, the charterers being a foreign company, the place of payment shall be Glasgow, and that payment is to be by the hands of the appellants. The Courts below have inverted the true principle of construction. Reading this clause, they have said that the natural construction is to impose a personal liability on the appellants, and they then proceed to read the qualification. Read in the light of the qualification this clause imposes no personal liability. The case on estoppel is not established by the evidence.

[On this point he referred to *Forlong* v. *Taylor's Executors* (1) and *Scott* v. *Howard*. (2)]

Condie Sandeman D.F. (with him *Albert Russell* (of the Scottish Bar) and *B. Sandeman* (of the English Bar)) for the respondents relied mainly upon the subsequent conduct of the appellants as establishing liability, and referred to *Young* v. *Schuler* (3); *Knights* v. *Wiffen* (4); *Hughes* v. *Metropolitan Ry. Co.* (5)

Craigie Aitchison K.C. replied.

The House took time for consideration.

1926. March 26. LORD ATKINSON. My Lords, I have had the pleasure and advantage of reading the judgment about to be delivered by my noble and learned friend Lord Sumner, and I entirely concur in it.

LORD SUMNER. My Lords, in this case the respondents, who are shipowners, sued the defenders for demurrage incurred at Grangemouth, the port of loading. The charter, made in 1920, was in the form of the Baltic and White Sea Coal Charter from east coast of England to Baltic ports. It began: "It is this day mutually agreed between Messrs. G. T. Gillie and Co., owners' agents .... and Atlantic Baltic Co.,

(1) (1838) 3 Sh. & Macl. 177, 210.
(2) (1881) 8 R. (H. L.) 59.
(3) (1883) 11 Q. B. D. 651.
(4) (1870) L. R. 5 Q. B. 660, 665.
(5) (1877) 2 App. Cas. 439, 448.

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Copenhagen, charterers." Throughout, obligations were assumed by and rights were stipulated for the "charterers," without further naming the Atlantic Baltic Co. Clause 19, the last in the print, ran: "5 per cent. brokerage is due by the vessel to G. T. Gillie and Co., one-third of which to exporters on signing the charter." One bill of lading was issued for the entire cargo, running thus: "Shipped by the Kimber Coal Co., Ltd., of Glasgow . . . . which are to be delivered unto the Atlantic Baltic Co. or their assigns." It was a clean bill of lading, and bore no indorsement of any claim for demurrage at the port of loading.

At the end of this printed charterparty there was an addition in manuscript, of which the material part ran: "Freight and demurrage (if any in loading) to be paid in Glasgow by the Kimber Coal Co." The charter was then signed in the following manner: "For the Atlantic Baltic Co., Copenhagen, J. B. Jamieson of the Kimber Coal Co., Limited. For and by telegraphic authority of owners, for G. T. Gillie and Co., J. Mathieson, as agents only."

There was no question that the defenders had authority to bind the Atlantic Baltic Co., or that the latter were duly made parties to the contract.

The interlocutor of the Sheriff-substitute, dated November 19, 1923, finds as a fact, that the charterparty was, as regards the manuscript clause, signed by the defenders' manager as and for the defenders' firm and not as agents for the Atlantic Baltic Co., but as representing themselves and accepting liability for the condition referred to and embodied in the said charterparty, and that the defenders, subsequent to August 6, 1920, wrote a letter to the pursuers' agents, stating that they would personally be responsible for payment in Glasgow of the demurrage. The first finding appears to me to be a matter of law, as to which the learned Sheriff-substitute interpreted the effect of the form of the signature contrary to the decided cases, and as to the second, an examination of the documents, in which the evidence was supposed to be found, showed that there was no such evidence whatever, but that their tenor had been misunderstood.

The latter part of this interlocutor was, in fact, formally recalled by the learned Sheriff on January 3, 1924. In the Court of Session these interlocutors were discharged, and the interlocutor now appealed against was pronounced of new.

To any claim against the Kimber Coal Co., Ltd., upon the charter, as contracting parties on the face of it, there would have been a sufficient answer in limine—namely, that Mr. Jamieson's signature did not purport to be the signature of the Kimber Coal Co., Ltd., or to be attached to the charter on their behalf. The reference to the company was only by way of description of the person of Mr. Jamieson himself. The Kimber Coal Co., however, expressly disclaimed any right to raise this defence and accepted liability notwithstanding, if on any other ground it could be established. No doubt, if the point had been taken, a new action would have been raised against Mr. Jamieson.

The first issue, therefore, was the familiar one whether, by reason of the form of the signature, the Kimber Coal Co., Ltd., had been made liable upon the charter. The issue arises in a very simple form, which makes immaterial many of the authorities commonly cited in such cases. The Kimber Coal Co. are nowhere named in the body of the charter as charterers, while the Atlantic Baltic Co. are so named throughout. Every obligation, of which the shipowners could claim performance by the named charterers, was capable of being performed by them, directly or by their agents, and, except for the second issue arising on the manuscript clause, every obligation was so performable. The form of the signature was simple. No words of limitation were added after the name which was taken to be the company's, but there were prefixed to it the words "for the Atlantic Baltic Co., Copenhagen." The defenders argued that to say "we sign for the company, who are the named "charterers," is the same as to say: "we sign as their agents. He who signs 'for' another does so as his agent to sign."

My Lords, in itself I think this contention is correct, nor was this point very stoutly contested. The authorities

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support it on the whole : *Redpath* v. *Wigg* (1), per Willes J. ; *Alexander* v. *Sizer*. (2) Lord Ellenborough, in *Leadbitter* v. *Farrow* (3), asks : " Is it not an universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it *for* another, or by procuration of another, which are words of exclusion ? " On the other hand, in *Wake* v. *Harrop* (4), where the charter was expressed in the body to be between Wilkinson, owner, and Harrop, charterer, and was signed " for Davidson, Messina, Harrop & Co., agents," Bramwell B. thought with doubt that the signature did not make Harrop personally liable, while Wilde B., following *Lennard* v. *Robinson* (5), since overruled, held that it did. The case was actually decided on another ground. In *Ariadne Steamship Co.* v. *James McKelvie & Co.* (6) Atkin L.J. says : " ' C. on behalf of B.' is . . . . an assent of C. to the contract, not so as to bind himself but to bind B." In *Gadd* v. *Houghton* (7) the words " on account of James Morand & Co." were inserted in the body of the sold note, but were not attached to the signature. This position has been regarded in some of the cases as one less effectual to negative the personal liability of the signatory, but, in spite of it, the words sufficed. " How can the words ' on account of James Morand & Co.," asks Mellish L.J., " be inserted merely as a description ? The words mean that Morand & Co. are the people who have sold. It follows that the people who have signed are merely the brokers and are not liable."

The decision in *Parker* v. *Winlow* (8) rests on the fact, that the signature itself was unqualified and that the words " agent for E. Winlow and Son " occurred in the body of the document, where at any rate they could be read as mere words of personal description. Similarly in *Oglesby* v. *Yglesias* (9) the words " as agent for the freighter," used in describing one of the parties, were held not to be sufficient

(1) (1866) L. R. 1 Ex. 335, 340.
(2) (1869) L. R. 4 Ex. 102.
(3) (1816) 5 M. & S. 345, 349.
(4) (1861) 6 H. & N. 768, 775, 776.
(5) (1855) 5 E. & B. 125.
(6) [1922] 1 K. B. 518, 535.
(7) 1 Ex. D. 357, 360.
(8) (1857) 7 E. & B. 942.
(9) (1858) E. B. & E. 930.

to qualify an unrestricted signature at the end. Yglesias, "as agent for the freighter," might well be assisting him by giving his own personal liability to the transaction. *Weidner* v. *Hoggett* (1) is a case in which the document began: "I undertake to load with Bebside coals . . . ." and was signed "W. S. Hoggett." The words "on account of Bebside Colliery" occurred in print over Hoggett's name, but it was shown that those words were the name of a pit, not of any persons or company, who could be Hoggett's principals, and they were taken as representing the source from which the cargo was to come, the promise being that of Hoggett himself. Reference should be made to 35 L. T., at p. 369, for the full terms of the document.

The second point taken on the charter I think may be put thus. The words in manuscript, "to be paid by the Kimber Coal Co.," in themselves import a personal promise by the named payors, sufficient to rebut any inference to the contrary from the form of the signature. Still more is this clear, when it is borne in mind, that the named charterers were abroad. It is not as if the qualification of the signature of the Kimber Coal Co. had been worded like that of the signature of the shipowners. To sign "for" the Atlantic Baltic Co. is consistent with signing for the Kimber Coal Co., Ltd., themselves as well. There is no addition of "as agents only."

My Lords, I do not think it necessary to go into the question how far evidence might have been called to add a party—namely, the Kimber Coal Co., Ltd.—as chargeable on the contract, for the manuscript words do not in themselves import a promise by any other party than the charterers. They bind the charterer to make payment in Glasgow by the hands of agents, whom the charter names in advance, and to be answerable for seeing that this is done, but they no more import the personal promise of those agents than would a stipulation, that the charterer's agents should send a sailing telegram or make an advance to the captain for ship's expenses.

(1) (1876) 1 C. P. D. 533.

H. L. (Sc.) 1926 KIMBER COAL CO. v. STONE AND ROLFE, LD. Lord Sumner.

In effect, at the trial an attempt was made to prove that the Kimber Coal Co., Ltd., came under personal liability, because they had induced the captain to forego his intention of indorsing the demurrage on the bill of lading, on the faith that they would themselves pay demurrage in Glasgow in virtue of this clause. There was also an attempt to prove a promise by them to pay independently of the clause and of any estoppel. All, however, that the evidence came to was, that the defenders, as charterers' agents, agreed the date of the commencement of the demurrage days with the captain, but no promise by them nor any change of position by him in reliance upon their conduct could be made out at all. It was also put to your Lordships that on the evidence the Kimber Coal Co., Ltd., should be held to have been parties to the charter throughout on the authority of *Young* v. *Schuler*. (1) The signature there was "P. P. A. John Abrahams & Co., J. Otto Schuler," the contract being expressed to be between Young and Abrahams & Co. As Cotton L.J. observes: "Prima facie he would be taken to have signed only for Abrahams & Co." but, there being evidence that he meant to sign in both capacities, for Abrahams & Co. as principal debtors and for himself as surety, he was held liable.

There was no sufficient evidence to that effect in the present case. Accordingly it is not necessary to discuss *Young* v. *Schuler*. I think that, in any case, great difficulties would have faced the respondents, if such evidence had been forthcoming, for then it would have been necessary to elect whether the Kimber Coal Co., Ltd., were to be charged as parties to the manuscript clause only or to the whole of the contract of charterparty. In this latter case, with great deference to the judgment in the Court below, I doubt if the words of the manuscript clause could be construed as words of promise by them. In any case they can only be reconciled with cl. 6, which says that the charterers will pay demurrage, by reading the reference to the Kimber Coal Co., Ltd., as the charterers' nomination of the Glasgow agents by whose hands they will pay. In the former case, if they were bound

(1) 11 Q. B. D. 651, 655.

by the entire charter, I do not see why they were named in that clause at all.

My Lords, I think that for these reasons the appeal should be allowed.

My Lords, I am desired to say that the judgment which I have just read has the assent of my noble and learned friends Viscount Dunedin, Lord Shaw and Lord Carson.

Interlocutor of the First Division of the Court of Session in Scotland discharged and cause remitted back to the Court of Session with a direction to enter judgment for the appellants and to do therein as shall be just and consistent with this judgment. The respondents to pay the costs of the action in the Sheriff Court and in the Court of Session, and also the costs of the appeal to this House.

Lords' Journals, March 26, 1926.

Agents for the appellants: *Rollit, Sons & Haydon, for J. George Reid, S.S.C., Edinburgh.*

Agents for the respondents: *Holman, Fenwick & Willan, for Maclay, Murray & Spens, Writers, Glasgow, and J. & J. Ross, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.)* 1926 March 23.

MACLAINE AND COMPANY . . . APPELLANTS;

AND

ECCOTT . . . . . RESPONDENT.

Revenue—Income Tax—Assessment—Foreign Firm—Exercise of Trade within United Kingdom—Profits arising from Sales by a Non-resident to a Non-resident—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 41—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sch. D—Finance (No.* 2) *Act*, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 31, *sub-ss.* 1, 2, 6, 7.

The effect of sub-s. 7 of s. 31 of the Finance (No. 2) Act, 1915, is to exempt from taxation in the name of a resident agent all sales and transactions between non-residents, even though effected through the medium of the resident agent, except in cases where the agent receives the profits.

A Java firm were assessed to income tax in the name of their London agents in respect of profits arising from the sale of goods purchased by the Java firm and on their instructions sold in London by their London agents, either directly or through brokers, such goods not being consigned to the London agents, but being delivered by the Java firm direct to the purchasers in whatever country they may happen to carry on business. The prices for the goods were fixed by the Java firm, and payment was made by the purchasers through London banks having dealings with Java and was received by the Java firm in Java before delivery:—

Held, (1.) that in the case of a merchant's business the trade was (generally speaking) exercised at the place where the contracts of sale were made, and that in respect of these sales the Java firm were exercising a trade in the United Kingdom within the meaning of the Income Tax Acts.

Crookston v. *Furtado* 1911 S. C. 217; 5 Tax Cas. 602 overruled on this point.

But (2.) that there should be excluded from the assessment the profits on sales by the Java firm to non-resident persons, in cases where the profits were not received by the London agents.

Decision of the Court of Appeal varied.

APPEAL from an order of the Court of Appeal in so far as it affirmed a decision of Rowlatt J., upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts, in respect of section C of the case, and in so far as it reversed his decision in respect of section E (1.) of the case.

* *Present:* VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD SUMNER.

The appellants (called in the case "the London firm") were the regular London agents of Messrs. Maclaine, Watson & Co., a firm of Java merchants (called in the case "the Java firm").

The appellants appealed to the Special Commissioners against assessments to income tax made upon them for the three years ended on April 5, 1916, 1917 and 1918, as agents for the Java firm in respect of profits deemed to arise to the Java firm from the exercise of trade in the United Kingdom.

The London firm undertook to arrange the sale in the London market of goods consigned to them by the Java firm, such goods being either purchased by the Java firm or consigned for sale on commission by that firm on behalf of native growers. The London firm also undertook to sell through brokers in London goods consigned direct from Java to the purchasers in whatever country such purchasers might happen to carry on business.

The several transactions to which the assessments related were classified by the Commissioners under several heads from A to E. This appeal is concerned only with the goods mentioned in section C and with a portion of the goods mentioned in section E (1.).

The case, after dealing with the sales of goods consigned to the London firm in sections A and B, continued as follows :—

"SECTION C.

In other cases goods purchased by the Java firm are not consigned to the London firm. In such cases the Java firm advises the London firm that it has purchased or is able to purchase certain goods and desires to sell them at a named price. The London firm then either itself makes inquiries for purchasers or instructs brokers to sell at the price named and informs the Java firm by cablegram either that it has sold the goods or that the goods have been sold through brokers and in what way the money will be paid. In such cases since the goods are to be consigned to the purchaser by the Java firm it is essential for them to receive payment

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before the delivery of the goods and the transactions are carried through as follows :—

The purchasers open a credit with a bank in London in favour of the Java firm or make a payment to a bank in London the bank being designated by the London firm as a bank able to remit the money to Java or known as a bank acting as London agent for Java banks. The bills of lading are not made out in favour of the London firm but in favour of the purchaser or of the bank in London at which payment is being made or the credit has been opened. Bills of exchange to which are attached the bills of lading and the invoices of the Java firm are then drawn upon the purchaser or upon the London bank by the Java firm and sold to a bank in Java which is in communication by cablegram with the bank in London to which the payment has been made or with which the credit has been opened by the purchaser. The bank in Java which has purchased the bills of exchange sends them with the bills of lading to its own London agents to present to the bank in London from which it receives payment and the bank in London thus receiving the bills of lading delivers them to the purchaser. In this way the Java firm receives payment in Java from the bank purchasing the bills and the bank purchasing the bills is recouped by payment in London.

The goods sold in the manner above described in this section are generally purchased by brokers acting either on their own account or on behalf of other persons, and may be consigned either to the United Kingdom or elsewhere. Thus in the case of a transaction described to us the London firm negotiated the sale on behalf of the Java firm of certain goods to purchasers in Vancouver. The purchasers opened a credit with a bank in Vancouver which opened a credit with a bank in London and against this London credit the Java firm drew bills of exchange on the London bank for the amount of their invoice. These bills were sold by the Java firm to a bank in Java who paid the Java firm the equivalent in guilders. That bank in Java sent the bills to its London agents and got payment for them from the London bank which had given the credit.

The goods were sent direct from Java to Vancouver.

The negotiations undertaken by the London firm in transactions of the kind described in this section take various forms. Sometimes the London firm merely instructs brokers to sell goods on behalf of the Java firm at a named price for payment in the prescribed manner. Sometimes the price named cannot be obtained but offers are made at a lower price and communicated by the London firm to the Java firm for acceptance or rejection. Sometimes the London firm finds purchasers at a better price and is able to arrange the sale to them. In carrying out the negotiations the London firm throughout purport to act as agents for the Java firm, with whom they are in constant telegraphic communication. The price at which the goods shall be sold is never fixed without the authority of the Java firm.

For the information of the Court the following copies of three typical contracts (marked 'G' 'H' and 'I' respectively) are annexed to and form part of this case.

G. 1st February 1915. Contract through brokers to sell 6000 tons of sugar to Edward Grey & Co., of Liverpool.

H. 28th January 1915. Contract through brokers to sell 2000 tons of sugar to a firm in Tokio.

I. 11th September 1916. Contract by a firm of brokers acting as dealers to purchase hides together with certain letters and telegrams leading up to such contract.

In all the transactions referred to in this section the contracts arranged by the London firm are for sales of goods by description. Goods of the description given may or may not be in the possession of the Java firm at the time when the contracts are made. The contracts are fulfilled by the delivery of goods of the required description subject in most if not all cases to arbitration if any dispute arises in accordance with the usual practice in similar cases of the market in London or Liverpool in which the contracts are negotiated as provided for in the various contracts.

The goods contracted to be sold are in accordance with the contracts put on board ship in Java from time to time in parcels till the whole quantity specified in each case has been

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despatched. The sales in some cases are on f.o.b. terms and in some cases c.i.f. terms."

The transactions comprised in section E (1.) related to the supply to the British Government of 220,000 tons of sugar in the year 1915, and this appeal was confined to 166,000 tons of that supply. The question whether there was a sale of the whole or any part of this sugar in the United Kingdom turned mainly upon the correspondence between the parties, and raised no question of any general legal interest.

As regards the transactions mentioned in section C the Commissioners decided upon the authority of *Crookston* v. *Furtado* (1) that these transactions did not constitute the exercise of a trade within the United Kingdom by the Java firm. As regards the sugar mentioned in section E (1.), the Commissioners decided that liability attached in respect of the whole 220,000 tons.

Rowlatt J. reversed the determination of the Commissioners under section C, and as to section E (1.) he affirmed their determination as regards 54,000 tons and reversed their determination as regards 166,000 tons.

The Court of Appeal decided in favour of the Crown on all points. They affirmed the decision of Rowlatt J. as regards section C, and as regards section E (1.) they affirmed his decision as to the 54,000 tons and reversed his decision as to the 166,000 tons.

1926. Feb. 5, 8, 9. *Sir John Simon K.C.* (with him *Latter K.C.* and *Bremner*) for the appellants. The question whether a trade is exercised in the United Kingdom is a question of fact and is not concluded by the question where the formal acceptance of the contract may be. As regards the transactions comprised in section C the Commissioners have decided this question of fact in favour of the appellants. A non-resident who instructs brokers in the United Kingdom to sell goods on his behalf cannot lawfully be assessed in respect of profits arising from such sale, and the fact that such instructions are passed on to the brokers by an agent in the

(1) 1911 S. C. 217; 5 Tax Cas. 602.

United Kingdom cannot make any difference. The Java firm fixes the prices and gets payment in Java, the goods are consigned by the Java firm direct to the purchasers in whatever country they may be, and in most cases the purchasers are non-residents. All these facts go to show that the transactions in question did not amount to an exercise of trade in the United Kingdom.

[He referred to the Income Tax Act, 1853, s. 2, Sch. D, the Income Tax Act, 1842, s. 41, and the Finance (No. 2) Act, 1915, s. 31, sub-s. 1 (*b*), and sub-ss. 6 and 7, and to *Erichsen* v. *Last* (1); *Grainger & Son* v. *Gough* (2); *Crookston* v. *Furtado* (3); *Wilcock* v. *Pinto & Co.* (4); *Macpherson & Co.* v. *Moore.* (5)]

Sir Douglas Hogg A.-G. and *Reginald Hills* for the respondent. Where the trade is selling goods the trade is exercised at the place where the contracts are made. But there are here other circumstances in favour of the view. The sales were sales through London agents of goods on the English market and in some cases to English purchasers. This case is not affected by sub-s. 7 of s. 31 of the Finance (No. 2) Act, 1915. That sub-section does not exempt from liability a person who would otherwise be liable; it is a protective sub-section to prevent the rest of the section from being read too widely and may have had reference to sub-s. 2, which but for *Smidth & Co.* v. *Greenwood* (6) might have been thought to enlarge the area of charge. Sub-s. 7 has also been considered by Rowlatt J. in *Muller* v. *Lethem.* (7)

Sir John Simon K.C. in reply. On the contention of the Crown the words "with other non-residents" become immaterial. It was desired, while defeating the device of avoiding liability to income tax by providing that the agent should not touch the purchase money, to guard against an excessive extension of liability. Sect. 31 sweeps away the old limitation that the agent must receive the money, but

(1) (1881) 8 Q. B. D. 414.
(2) [1896] A. C. 325.
(3) 1911 S. C. 217; 5 Tax Cas. 602.
(4) [1924] 1 K. B. 304; [1925] 1 K. B. 30.
(5) (1912) 6 Tax Cas. 107.
(6) [1921] 3 K. B. 583, 590, 591, 595; [1922] 1 A. C. 417.
(7) July 10, 1925. Tax Leaflets, 1925, No. 194.

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at the same time provides against liability in cases of sales between non-residents. The main effect of s. 31 was to remove the condition that the agent should receive the money. But in practice the agent would only receive the money in a transaction between a resident and a non-resident, and but for sub-s. 7 the practical operation of the section would have been extended unduly by the removal of the condition of liability in the case of sales where both parties were non-residents. Sub-s. 7 is designed to stop that. That construction at least gives some effect to the words "with other non-residents."

[He referred to *Sulley* v. *Attorney-General.* (1)]

The House took time for consideration.

1926. March 23. VISCOUNT CAVE L.C. My Lords, the question to be determined on this appeal is whether Messrs. Maclaine, Watson & Co., of Java (whom I will call "the Java firm"), have been properly assessed by the Commissioners for Special Purposes of Income Tax in the name of Messrs. Maclaine & Co., of London (whom I will call "the London firm"), as their agents to income tax in respect of the profits arising from certain trading transactions.

The Java firm has its commercial residence in Java, where it carries on an extensive business in the sale (either as principal or on commission) of the products of the Dutch East Indies, such as sugar, hides, rubber, tapioca and tea. The London firm, which consists of certain partners or retired partners in the Java firm but is a distinct partnership concern, acts as the general agent of the Java firm in London, and on the instructions of that firm effects sales in England (either directly or through brokers) of considerable quantities of goods, of which some are consigned to the London firm for sale and delivery, while others are not so consigned, but when sold are delivered by the Java firm to the purchasers. Payment for the goods so sold is made sometimes through the London firm, but oftener directly to the Java firm or to

(1) (1860) 5 H. & N. 711, 717.

bankers in London designated for that purpose. Until October, 1917, the London firm received no remuneration from the Java firm for its services, but since that date it has been paid or allowed a commission; the appeal relates to transactions which took place partly before and partly after this change, but nothing turns on the distinction.

The transactions with which the Commissioners for Special Purposes had to deal were, in the case stated by them for the opinion of the Court, grouped in five sections—A, B, C, D and E; but this appeal is concerned with sections C and E only. I will take first section C, which relates to goods purchased by the Java firm and on its instructions sold by the London firm in London, such goods not being consigned to the London firm but being delivered by the Java firm directly to the purchasers. In all these cases the contracts of sale were negotiated and entered into, or the instructions for sale were given to the brokers, by the London firm as agent for the Java firm; but the prices at which the goods were sold were never fixed without the authority of the Java firm, and payment was made by the purchasers through London bankers. It was held by the Commissioners on the authority of the case of *Crookston* v. *Inland Revenue* (1) that in the case of these sales no trade was exercised within the United Kingdom by the Java firm, which was accordingly not assessable in the name of the London firm in respect of the profits so made. Rowlatt J. came to a different conclusion, and his judgment was affirmed by the Court of Appeal; the first question is whether that decision is correct?

My Lords, I feel no doubt that, except as to a particular class of transactions which I will mention later, the conclusion reached by Rowlatt J. and the Court of Appeal under this head was right. The assessments in question relate to the years 1916, 1917 and 1918, and are therefore regulated by the Income Tax Acts of 1842 and 1853 and the Finance Act of 1915. Under Sch. D of the Act of 1853 tax was payable in respect of the annual profits or gains accruing to any person,

(1) 1911 S. C. 217; 5 Tax Cas. 602; also cited as *Crookston* v. *Furtado*.

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whether a subject of His Majesty or not, resident in the United Kingdom, from any trade "exercised within the United Kingdom." By s. 41 of the Act of 1842 any person chargeable with income tax in respect of any such profits or gains and not resident in the United Kingdom was made chargeable in the name of any agent having the receipt of the profits or gains as if such person were resident in Great Britain; and by s. 31 of the Finance Act, 1915, s. 41 of the Act of 1842 was extended so as to make a non-resident person chargeable in the name of his regular agent in the United Kingdom in respect of profits and gains arising through such agent, although the agent might not have the receipt of the profits or gains of the non-resident. From these enactments it follows that, if the Java firm exercised a trade within the United Kingdom through the agency of the London firm, the Java firm is (subject to an exception which I will refer to later) chargeable with tax on the profits of that trade in the name of the London firm, whether those profits did or did not pass through the hands of the London firm; and accordingly the principal questions to be determined are whether the Java firm did so exercise a trade in this country, and whether the profits arising from the transactions described in section C were profits of that trade.

The question whether a trade is exercised in the United Kingdom is a question of fact, and it is undesirable to attempt to lay down any exhaustive test of what constitutes such an exercise of trade; but I think it must now be taken as established that in the case of a merchant's business, the primary object of which is to sell goods at a profit, the trade is (speaking generally) exercised or carried on (I do not myself see much difference between the two expressions) at the place where the contracts are made. No doubt reference has sometimes been made to the place where payment is made for the goods sold or to the place where the goods are delivered, and it may be that in certain circumstances these are material considerations; but the most important, and indeed the crucial, question is, where are the contracts of sale made? Statements to this effect by Brett and Cotton L.JJ. in

Erichsen v. *Last* (1) were quoted with approval in this House in the case of *Grainger & Son* v. *Gough* (2); and the same principle was the basis of the decisions in *Werle & Co.* v. *Colquhoun* (3); *Lovell & Christmas* v. *Commissioner of Taxes* (4); *Greenwood* v. *Smidth & Co.* (5); and *Wilcock* v. *Pinto & Co.* (6) The decision in *Crookston* v. *Inland Revenue* (7) may probably be supported for the second reason given by the Court—namely, that the profits there in question had not been received by the agents; but on the question first discussed—namely, as to the place where the trade was carried on—I think that the reasoning of Lord Dundas is to be preferred to that of the other members of the Court.

My Lords, if in the present case this test is applied to the transactions falling under the heading C, it will appear plainly that in the cases falling under that heading the trade of the Java firm was exercised in this country. It is true that the goods were not consigned to the London firm nor was the purchase-money paid to them, and that in every case the goods sold were delivered by the Java firm to purchasers outside the United Kingdom; but the contracts for sale were made in London through the agency of the London firm, and the purchase-money was in most cases paid through a London bank. I think it clear that this part of the trade of the Java firm was exercised within the United Kingdom.

But there remains a serious question as to the effect of sub-s. 7 of s. 31 of the Act of 1915, which is in the following terms: "The fact that a non-resident person executes sales or carries out transactions with other non-residents in circumstances which would make him chargeable in pursuance of this section in the name of a resident person shall not of itself make him chargeable in respect of profits arising from those sales or transactions."

It was contended on behalf of the appellants that the effect of this sub-section is to exempt them from assessment in

(1) 8 Q. B. D. 414.
(2) [1896] A. C. 325.
(3) (1888) 20 Q. B. D. 753.
(4) [1908] A. C. 46.
(5) [1922] 1 A. C. 417.
(6) [1925] 1 K. B. 30.
(7) 1911 S. C. 217; 5 Tax Cas. 602.

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respect of the profits of any sales by the Java firm to non-residents, though effected through their agency. It is noticeable that no reference to this contention is to be found in the case stated or in any of the judgments in the Courts below; but your Lordships were assured by counsel for the appellants that the point was fully taken before those tribunals, and accordingly it must be dealt with.

My Lords, sub-s. 7 of s. 31 has not yet received full consideration in any reported case. In *Smidth & Co.* v. *Greenwood* (1) Atkin L.J. referred to it as a sub-section "the precise meaning of which no one in the course of the argument was prepared to state," and in a very recent case of *Muller* v. *Lethem* (2) Rowlatt J. observed that "no one had been able to tell him quite what effect this sub-section had"; but in the latter case the learned judge gave a doubting assent to the suggestion put forward by counsel for the Crown "that people thought business wholly carried on abroad might be brought into taxation by reason of the circumstance that there was an agent in England who intervened in some way in the business, and that it [the sub-section] was put in to keep out that sort of case, which would not come in really if the matter were understood, because the initial condition has to be fulfilled that the business shall be carried on in England." A similar explanation was put forward in the present case by the learned Attorney-General, who laid emphasis on the words "executes sales or carries out transactions" contained in the sub-section, and contended that the only effect of the sub-section was to free from tax the profits on sales made abroad and only completed in this country. With the greatest respect for the opinion of Rowlatt J., I do not think that this explanation gives proper effect to the words of the sub-section. The sub-section applies only to sales or transactions by a non-resident "in circumstances which would make him chargeable in pursuance of this section in the name of a resident person"; and in the case of sales and transactions wholly made or entered into abroad, those circumstances do not exist. The

(1) [1921] 3 K. B. 583, 595. (2) Tax Leaflets, 1925, No. 194.

sub-section must, therefore, apply to sales made here through an agent or other person resident here; and no construction can, I think, be accepted which makes it applicable only to sales made abroad. Having read the sub-section more than once, I have come to the conclusion that its intention and effect is to exempt from taxation in the name of a resident agent or other person in the position of an agent all sales and transactions between non-residents, even though effected through the medium of that agent or other person, except in cases where the agent or other person receives the profits. It is (I think) important to bear in mind the history of these provisions for vicarious taxation. The effect of s. 41 of the Act of 1842 was to tax the foreigner trading through an agent in this country only if the profits of the trading passed through the hands of the agent. Doubtless it was found that this provision was evaded by the expedient of arranging that, where goods were sold by a foreign trader through an agent here, the proceeds of sale should not pass through the hands of the agent but should be paid to a foreign agent or to the principals; and accordingly by s. 31 of the Act of 1915 the condition of payment through an agent was repealed. But there was an obvious danger lest so large an extension of the machinery for taxing persons resident abroad on transactions in this country should damage the position of this country as a centre of foreign trade; and accordingly the section contains two provisions designed to avoid that result. Sub-s. 6 ensures that a non-resident instructing a broker or other casual agent in this country shall not be chargeable in the name of such broker or agent in respect of the profits arising from his activities; and sub-s. 7, as I read it, provides that when one non-resident sells goods to another non-resident through the regular agent of the former in the United Kingdom and the proceeds of sales do not pass through the agent's hands, the agent shall not, in the absence of other circumstances which make him chargeable, be chargeable with the tax. In both these cases there were good reasons for the exemption; for in both cases the proceeds of the transaction would not normally pass through the hands of the broker or agent, who

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would therefore have no direct means of protecting himself against the charge of income tax, and in both cases the imposition of the charge would tend to divert business from this country. It appears to me that the juxtaposition of the two sub-sections is not accidental, and that similar reasons of policy may well account for them both. It is true that in order to arrive at this construction a wide meaning must be given to the expression "executes sales or carries out transactions," for that expression must be held to include the actual contracts of sale; but it is plain that the words "sales or transactions carried out" contained in sub-s. 6 have that wider meaning, and it appears to me that the like meaning must be given to the similar expressions in sub-s. 7. The alternative is to hold that sub-s. 7 is a mere unintelligible collection of words, and this I am unwilling to do.

Counsel for the appellants asked your Lordships to go further, and to hold that the effect of sub-s. 7 is wholly to exempt a non-resident trading with another non-resident through an agent in the United Kingdom from taxation of his profits in that trade. The point does not arise in this case, and it is enough to say that in my opinion this contention was not made out. It was held in *Smidth's* case (1) that s. 31 deals with machinery only, and that sub-s. 2 of the section was not to be construed as imposing a charge which did not previously exist; and, similarly, I do not think that sub-s. 7 was intended to remove any existing charge. The words "make him chargeable" appear to mean "make him so chargeable," that is to say, chargeable in pursuance of the section in the name of a non-resident person.

My Lords, the second part of the appeal relates to certain sales described in section E of the case, being sales of about 220,000 tons of sugar by the Java firm to the British Government; and as to 146,000 tons of this sugar it was contended on behalf of the appellants that the sales were made not through their agency but by the Java firm in Java. This point was fully dealt with in the judgment of the learned Master of the Rolls, and it is enough to say that I agree

(1) [1922] 1 A. C. 417.

entirely both with his summary of the facts and with the conclusion at which he and the learned Lords Justices arrived. The formal contracts for the sale of this sugar were made between the London firm "for and on behalf of" the Java firm and the Sugar Commission; and, even apart from these formal contracts, the correspondence appears to me to show clearly that throughout these transactions the London firm acted as the agents of the Java firm and themselves concluded the sales. I think that on this point the appeal wholly fails.

For the above reasons I am of opinion that the order of the Court of Appeal should be varied by discharging the order of Rowlatt J., in so far as it reversed the decision of the Commissioners with regard to sales by the Java firm to non-resident persons in respect of which the profits were not received by the appellants, and that the matter should be remitted to the Commissioners with a direction to exclude from the assessment the profits on sales of that description, and that in other respects the order of the Court of Appeal should be affirmed. There should be no costs of this appeal.

My Lords, my noble and learned friend Viscount Haldane desires me to say that he concurs in this judgment.

LORD ATKINSON. My Lords, I have had the pleasure and advantage of reading the judgment which has just been delivered by my noble and learned friend on the Woolsack, and I thoroughly concur in it.

LORD SHAW OF DUNFERMLINE. My Lords, I agree with the conclusions announced by the Lord Chancellor, and, in substance, with the entire reasoning upon which those conclusions are reached. I only venture to state separately the views which I entertain as to the bearing and effect of s. 31 of the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89).

But I may be allowed before doing so to add but a few words to those of the Lord Chancellor in regard to the case of *Crookston* v. *Furtado*. (1) It humbly appears to me that the judgment of the majority of the learned Lords of the

(1) 1911 S. C. 217, 233; 5 Tax Cas. 602, 623.

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Second Division was erroneous. I think the weight of authority upon the subject in England was much too lightly treated. As illustrative of this I may cite the following passage from Lord Salvesen's judgment: "I am fully aware," says he (it was a clear case of a contract completed in England), "that my opinion runs counter to some dicta of the English judges, and especially to the dictum of Lord Justice Brett in the case of *Erichsen*, which was quoted without disapproval in the subsequent case of *Grainger & Son*, and from which it might be inferred that the fact that a foreign company makes its contracts in England for the sale of its goods there, even when it does so through an agent, is of itself sufficient to constitute an exercise of trade by a foreign company, so as to render it amenable to assessment under our fiscal law."

My Lords, in the case of *Grainger* (1) Lord Herschell said: "In all previous cases contracts have been habitually made in this country. Indeed, this seems to have been regarded as the true test whether trade was being carried on in this country. Thus, in *Erichsen* v. *Last* (2) the present Master of the Rolls said: 'The only thing which we have to decide is whether, upon the facts of this case, this company carry on a profit-earning trade in this country. I should say that whenever profitable contracts are habitually made in England, by or for foreigners, with persons in England because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England even though everything to be done by them in order to fulfil the contracts is done abroad.'"

It appears to me that it gives insufficient weight to the important judgment in *Grainger's* case to treat it as having quoted the observations of Brett L.J. in *Erichsen* v. *Last* "without disapproval," and I agree with the learned Lord Dundas that Lord Herschell agreed with and approved of Lord Esher's expressions.

I go so far as respectfully to adopt as my own the judgment of Lord Dundas, who dissented from the majority of the

(1) [1896] A. C. 325, 335. (2) 8 Q. B. D. 414, 418.

Second Division judges, and in particular to accept his statement to this effect (1): "I now come to the last and, as I think, the most important question of fact, viz., whether or not the contracts of sale by the company were made within the United Kingdom. In my opinion, they were so made. It is admitted that 'the appellants have authority to sell the company's phosphates at or over minimum prices fixed by the company. The appellants make the sales without reference to the company. It is left to the appellants' discretion to whom to sell.' Crookston Brothers, therefore, are not mere canvassers for orders, to be approved or rejected by their principals, but have full authority to make contracts of sale, so long as the price they contract for is not below the prescribed minimum."

Lord Dundas gives a careful citation of the authorities and adds: "If I am right in holding that the sales are made in this country, I consider that it follows from the decisions, and particularly from the opinions in *Grainger & Son* v. *Gough* (2), that the company exercises a trade here."

I humbly think that both Rowlatt J. and the Court of Appeal were right in disregarding *Crookston* v. *Furtado* (1) and in holding that it did not correctly interpret the Income Tax Act in the particular mentioned.

With especial reference to sub-s. 7 of s. 31 of the Act of 1915 the House is confronted in this case directly, and apparently for the first time, with the necessity for a decision upon the question of what I will, for shortness, call "double foreigner" transactions, that is to say, transactions in which the goods of one foreign merchant are sold to another foreign merchant and are delivered direct from the vendor's premises in one foreign country to the vendee's premises in another.

With regard to a considerable section of the goods under head C of this case, that is admitted to have been the nature of the transaction, and it is the kind of transaction which is directly aimed at as an exception in sub-s. 7. But there are, no doubt, difficulties in the construction of the sub-section

(1) 1911 S. C. 225; 5 Tax Cas. 614, 615.
(2) [1896] A. C. 325.

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in its relation to the section, and of the section in relation to the general body of taxing statutes.

Granted that the goods passed from vendor to vendee as described—namely, without reaching or passing through this country—it is, however, one of the admitted facts of the case that the vendor, the Java firm, had regular agents (the London firm), and that the contract of sale for the goods so transferred, say, from Java to Vancouver, was made in London. In substance nothing else took place in London. The payment was made into a credit opened by the Java firm with a London bank, but was received by the Java firm in Java.

No point arises in the case as to the agency of the appellants. It was not that of a firm casually employed or of a broker on Change. The appellants were regular agents.

I have already observed upon the Scotch decision of the case of *Crookston* v. *Furtado*. (1) I may say at once that I think it is now too late in the day, in a case with all its circumstances, such as that now under consideration of the House, where the contracts were made in London by regular agents in London, to deny that that crucial and fundamental fact conclusively affirms the proposition that the sales thereunder were in the exercise of a trade within the United Kingdom.

The sales in question were as stated "double foreigner" transactions, the foreign vendor having a regular English agent and having completed the trade contracts—of which these transactions form a part—in England. It is clear that the language of Sch. D of s. 2 of the Act of 1853 imposing income tax on the annual profits and gains arising from trade "exercised within the United Kingdom," although such profits accrue to a person "whether a subject of Her Majesty or not although not resident within the United Kingdom," would apply to this case, so far as the principal contracting party is concerned. The ground is accordingly clear for the consideration of the question under s. 31 of the Act of 1915.

My Lords, my first proposition upon the Finance Act of 1915, s. 31, is that in my view no repeal either express or

(1) 1911 S. C. 217; 5 Tax Cas. 602.

implied was effected of the liability of a foreign resident exercising a trade within the United Kingdom—that foreign resident still remains liable to income tax under the British taxation statutes. How he, the foreigner, is to be got at and the tax recovered from him is a question for the taxing authorities.

But the question before this House is not as to the liability of that foreigner direct but as to the vicarious liability of his English regular agent who has made the contracts in England. This raises the peculiar question of the position of those agents as persons responsible to the English taxing authorities for the taxation not upon profits which they themselves make by way of commission but also upon the actual profits of the transactions arising to their foreign principals.

It is manifest that the question is of wide importance. The object of the Legislature was to impose a tax upon profits from all trade exercised in England but, upon the other hand, to avoid the injury to or destruction of that great volume of foreign trade the central exercise of which by the making of contracts is through agents in Britain. In 1842 by s. 41 of the Income Tax Act of that year non-residents were made chargeable in the name of factors, agents or receivers "having the receipt of any profits or gains arising as herein mentioned." The reason for this proviso was obvious—namely, that the agent thus in receipt of the profits or gains would be able to debit himself in his account with his principal for the taxation upon those profits levied upon that principal through him, the agent.

This state of matters gave rise, it was found, to evasion; and it was altered by s. 31 of the Act of 1915. A former provision of the law (s. 41 of the Income Tax Act of 1842), in so far as it related to the taxation of non-residents, was extended so as to make these non-residents chargeable, although the agent might not have the receipt of the profits or gains. The stage that matters had then reached was accordingly that the profits on trade exercised for a foreign principal by a British agent were taxable in that agent's name. It appears to me on a purview of the section that it

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was in the contemplation of the Legislature that the goods, the subject of the transactions, were to reach this country and that the agent would thus be in a position of being able, without much practical difficulty, to effect his relief as against his principal for the income tax which he had paid on his behalf.

I think, further, that the general idea of the section was that although contracts, for instance, sales, had been made in this country on behalf of a non-resident, the other party to the contract—namely, the purchasers, were here. For instance, Brett L.J. in *Erichsen* (1) describes the general case as of contracts "habitually made in England, by or for foreigners, with persons in England because they are in England." I do not say that it is necessarily so, but that appears to be a statement, at least, of the general case, and, if so, the agent would again be protected by being in contact with one party to the transaction in England.

But there still remains a large branch of agency business to be preserved—business which had neither the protection of a contracting party being here nor of the goods being here. This appears to me to be worked out in sub-ss. 6 and 7. After full consideration I think these two sub-sections should simply be read together.

The first—namely, sub-s. 6, is that a non-resident person is not to be chargeable in the name of a casual, but only of a regular agent, and the second—namely, sub-s. 7, is that in the case of what I have called "double foreigner" transactions the agent is not responsible in respect of profit arising from sales or transactions between one non-resident person and another non-resident person, that is to say, that "double foreigner" business, though transacted through a regular agent in England, does not make that agent responsible for taxation upon it. To that extent—namely, when there is neither one of the parties to the transaction in this country, nor when the goods ever reach this country but are sent direct from one foreign country to another, the agent conducting the business in London has no vicarious responsibility for the

(1) 8 Q. B. D. 418.

taxation. That taxation will rest directly upon his principal in respect of having exercised a trade in England.

As to the language of the section, I think the carrying on of a trade is the same as the exercising of a trade, and that "sales or transactions carried out" are part of the exercise or carrying on of a trade.

In the result accordingly a considerable part of the trade in question in this case being admittedly "double foreigner" trade, that is, a trade, say, direct between Java and Vancouver, appears to me cut out of the ambit of an agent's responsibility for taxation. I agree with my noble and learned friend on the Woolsack that if it were not so cut out the protection to agents manifestly aimed at by sub-s. 7 would disappear. In my humble judgment that protection must be given effect to; the statute prescribes it.

LORD SUMNER. My Lords, for the reasons given by the Lord Chancellor I agree with the motion to be proposed from the Woolsack.

Ordered and adjudged that the Order of the Court of Appeal in part complained of be varied by discharging the Order of Rowlatt J., in so far as it reversed the decision of the Commissioners for the Special Purposes of the Income Tax Acts with regard to sales by the Java firm to non-resident persons in respect of which the profits were not received by the appellants; and that the matter be remitted back to the Commissioners with a direction to exclude from the assessment the profits on sales of that description, and that, subject to such variation, the Order of the Court of Appeal be affirmed; and further ordered that each party do pay and bear their costs in respect of the appeal to this House.

Lords' Journals, March 23, 1926.

Solicitors for appellants: *Dawes & Sons.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

[PRIVY COUNCIL.]

J. C.* 1926 Feb. 18.

ATTORNEY-GENERAL FOR ALBERTA . APPELLANT;

AND

REATA E. COOK . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION.

Divorce—Jurisdiction—Domicil—Decree for Judicial Separation—Domicil of Wife after Decree—Domicil in Canada—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85). *ss.* 16, 25, 26.

A decree for judicial separation made under s. 16 of the Matrimonial Causes Act, 1857, does not enable the wife to acquire a domicil different from that of her husband, and thus entitle her to sue for a divorce in a Court other than that of the husband's domicil. The effect of ss. 25 and 26 of the above Act upon the legal relationship of the spouses after a decree for judicial separation is confined within the precise terms of those sections.

For purposes of divorce the domicil of a person settled in one of the Provinces of Canada is that particular Province, though the Dominion Parliament has legislative power to dissolve the marriage.

Judgment of the Appellate Division reversed.

APPEAL (No. 16 of 1924) from a judgment of the Supreme Court of Alberta, Appellate Division (October 12, 1923), reversing a judgment of Walsh J. (February 24, 1923).

In November, 1921, the respondent obtained in the Supreme Court of Alberta a decree of judicial separation from her husband, both spouses at that time being resident in Alberta. The decree was made under the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), which is in force in Alberta: see *Board* v. *Board*. (1)

In 1922 the respondent instituted in the Supreme Court of Alberta a suit for divorce on the ground of adultery and cruelty; she obtained an order for substituted service upon her husband.

The trial judge (Walsh J.) found that Ontario was the domicil of origin of the husband, and that he had not acquired

* *Present:* VISCOUNT CAVE L.C., VISCOUNT HALDANE, VISCOUNT DUNEDIN, LORD SHAW, LORD PHILLIMORE, LORD BLANESBURGH, and LORD MERRIVALE.

(1) [1919] A. C. 956.

any other domicil. He dismissed the suit on the ground that the Court had no jurisdiction, as the respondent was not competent to acquire a domicil separate from that of her husband.

Upon the wife's appeal to the Appellate Division the Attorney-General for Alberta intervened.

The Appellate Division (Scott C.J., with Stuart, Beck, and Hydman JJ.; Clarke J. dissenting) allowed the appeal and made a decree dissolving the marriage.

On the motion of the Attorney-General for Alberta the Appellate Division granted leave to appeal to the Privy Council.

The present appeal was first heard by the Judicial Committee in March, 1925, but having regard to the general importance of the question raised was ordered to be reargued before a special Board.

1925. Dec. 7, 8, 10. *Frank Ford K.C.* and *W. O. Willis K.C.* for the appellant. The husband being domiciled in Ontario, the Court in Alberta had no jurisdiction to dissolve the marriage. The decree for judicial separation did not enable the wife to acquire a domicil different from that of her husband. The well established rule that the domicil of a wife is that of her husband is an incident of the marriage tie. The doubt expressed by Lord Cranworth in *Dolphin* v. *Robins* (1), whether a decree a mensa et thoro did not enable a wife to acquire a separate domicil, was obiter, and was expressly dissented from by Lord Kingsdown. The suggestion in *Le Sueur* v. *Le Sueur* (2) that desertion by a husband enabled a wife to choose a new domicil was rejected in *Lord Advocate* v. *Jaffrey*. (3) By s. 16 of the Matrimonial Causes Act, 1857, the effect of a decree for judicial separation thereunder is the same as that of a decree a mensa et thoro save so far as the Act provides. Sects. 25 and 26 effect only what they specifically provide; their effect is purely domestic. The view that a wife can acquire a separate

(1) (1859) 7 H. L. C. 390. (2) (1876) 1 P. D. 139.
(3) [1921] 1 A. C. 146.

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domicil from her husband conflicts with *Le Mesurier* v. *Le Mesurier* (1), which was approved by the House of Lords in *Lord Advocate* v. *Jaffrey*. (2) Though the present question did not arise in the last mentioned case, the judgments strongly support the appellant's contention. The decrees granted in *Armytage* v. *Armytage* (3); *Ogden* v. *Ogden* (4); *Stathatos* v. *Stathatos* (5); and *Montaigu* v. *Montaigu* (6) were granted to avoid peculiar hardship; those cases establish no exception to the general rule. They were not decided upon the view that there was a change of domicil; if they were, they were wrongly decided.

R. B. Bennett K.C. and *Hon. Geoffrey Lawrence K.C.* for the respondent. The wife was entitled, as the result of the decree of judicial separation, to acquire, and did acquire, a domicil in Alberta. A decree a mensa et thoro annulled the presumption that a wife's domicil is that of her husband: *Williams* v. *Dormer*. (7) A consideration of *Dolphin* v. *Robbins* (8) shows that it was Lord Kingsdown only who dissented from the view expressed by Lord Cranworth. But whatever may have been the effect of a decree a mensa et thoro, a decree of judicial separation under the Matrimonial Causes Act, 1857, enables a wife to acquire a separate domicil. The position assigned to her by ss. 25 and 26, in relation to property, contains all the factors which enable a person to acquire a domicil. It annuls in each material respect the marriage tie. The decisions in *Armytage* v. *Armytage* (9), and the cases following it are consistent only with the view contended for by the respondent. That view is supported strongly by decisions of the Supreme Court of the United States: *Barber* v. *Barber* (10); *Cheever* v. *Wilson* (11); *Haddock* v. *Haddock*. (12)

Frank Ford K.C. replied.

(1) [1895] A. C. 517.
(2) [1921] 1 A. C. 146.
(3) [1898] P. 178.
(4) [1908] P. 46.
(5) [1913] P. 46.
(6) [1913] P. 154.
(7) (1852) 2 Rob. Eccl. 505.
(8) 7 H. L. C. 390.
(9) [1898] P. 46.
(10) (1859) 21 Howard, 582.
(11) (1870) 9 Wall. 108.
(12) (1906) 201 U. S. 562.

1926. Feb. 18. The judgment of their Lordships was delivered by

LORD MERRIVALE. This is the appeal of the Attorney-General of Alberta from the judgment of the Supreme Court (Appellate Division) granting a decree of divorce in an undefended suit which in the trial Division had been dismissed for want of jurisdiction. The questions involved are of general importance—namely, whether a wife judicially separated from her husband may acquire a domicil of choice apart from the husband, and whether in the Courts of such her domicil she may obtain a decree of divorce upon grounds sufficient under the law there in force, although the husband is not there domiciled.

The respondent, the wife, was married to her husband in the Province of Ontario, in the Dominion of Canada, on July 16, 1913. Four years later they went to the United States. In 1918 she removed to Calgary in the Province of Alberta, and she resided there continuously until the hearing of the cause in question. "The husband," to cite the statement of the learned trial judge, Walsh J., "drifted from one State of the American Union to another, then came to Calgary for a short time, and eventually left Alberta, going, as far as is known, to a logging camp in British Columbia." Since then nothing was known of him.

In November, 1921, the wife sued in the Supreme Court of Alberta for judicial separation from her husband and was decreed the relief she sought, upon evidence which satisfied the Court that both the spouses were resident within its jurisdiction. The husband had been served there. In 1922 the wife instituted her present suit for divorce. She alleged that her husband's latest place of residence which was known to her was within the Province, and obtained an order for substituted service upon him of these proceedings.

As between the parties to the appeal it was assumed that there was such residence of the husband, and that there had been such service of the proceedings, as would have given jurisdiction to the Courts of Alberta in an ordinary action in personam. This assumption being made it was not thought

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necessary to consider—apart from the main questions in the case—whether there are conceivable grounds upon which, when jurisdiction depends upon domicil, it can be given by the rules of procedure of the forum resorted to (not being the forum of the domicil), or can be made to depend upon the presence or absence of a party sued who is in fact domiciled elsewhere.

With regard to the domicil of the parties the trial judge, Walsh J., "thought the evidence sufficient to justify a conclusion that Ontario was the domicil of origin of the husband and not to show that he had acquired any other domicil." The learned judge further found in express terms that "the husband is not and never was domiciled in Alberta." As to the wife, this is said in the judgment—"the argument is that . . . . as she has elected this as her domicil (as I think that she has so far as she can), this Court has jurisdiction to decree a dissolution of the marriage."

Walsh J. held at the hearing that if there was jurisdiction in the Court to decree a divorce of this marriage it should be decreed upon grounds of cruelty, desertion and adultery, but in view of the facts as to domicil the learned judge felt himself bound to act upon what he regarded as a well established rule of law that so long as the married state continues the wife's domicil is that of the husband. He therefore dismissed the suit.

Upon the wife's appeal to the Appellate Division, the Attorney-General of Alberta intervened because of the general importance of the questions involved, and the Attorney-General as intervener is appellant in this appeal against the judgment of the Appellate Division, whereby the decision of Walsh J. was, upon the majority of opinions, reversed.

In the Supreme Court, and upon the hearing of this appeal, a subsidiary question was raised whether the domicil of persons settled in one of the Provinces of the Dominion of Canada is domicil not in the particular Province, but in the Dominion, in such sense that rights dependent upon domicil within the Dominion may be determined in any Court in the Dominion having jurisdiction locally over the subject matter,

and that each such Court may summon before it a person domiciled within the Dominion and deal with such person in matters of status according to the laws in force within the territorial area of its jurisdiction.

The proposition that persons domiciled in all the Provinces of the Dominion of Canada have a Canadian domicil was founded upon the terms of the British North America Act, 1867, and the practice of the Canadian Legislature in respect of divorce. The statute in question enacts by s. 91, head 26, that the exclusive legislative authority of the Parliament of Canada shall extend to marriage and divorce, while by s. 92, head 22, the Legislature in each Province may exclusively make laws with regard to the solemnization of marriage in that Province. As to the exercise of the legislative power of the Dominion in respect of marriage and divorce, the only relevant facts which were laid before their Lordships were that in 1924 marriage was dissolved by Acts of the Dominion Parliament in 134 cases, and that such statutes commonly, if not invariably, set forth that the parties are domiciled in Canada. No doubt was raised but that the Dominion Parliament has legislative power to dissolve the marriage here in question.

The facts placed before their Lordships do not show with precision the extent of the conflict of laws in the Provinces of the Dominion with regard to marriage and dissolution of marriage, succession and testamentary disposition, though a passage in the judgment of Beck J. in the Appellate Division adverts to the two matters last mentioned. It was common ground, and is beyond question, that the Provinces have divers laws in respect of jurisdiction as to marriage and divorce, and that in some Provinces no means exist for divorce a vinculo by judicial process. No reference was made to any statute of the Dominion Parliament which deals with the question of jurisdiction in the Courts of the Provinces, inter se, to decree dissolution of marriage as between parties not alleging themselves to be domiciled in the same Province. But in *Board* v. *Board* (1) it was established by the decision

(1) [1919] A. C. 756.

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of the Judicial Committee that when the Province of Alberta was, in 1905, formed out of the North West Territory by Dominion Act, the laws of England as to divorce established by the Matrimonial Causes Act, 1857, became applicable to Alberta, and that the Supreme Court of the Province obtained jurisdiction to enforce them. *Board* v. *Board* (1) will be again referred to later on.

The purpose of ascertaining domicil is, as was said by Lord Westbury in *Bell* v. *Kennedy* (2), "to determine which of two municipal laws may be invoked for the purpose of regulating the rights of the parties." Lord Westbury also said in *Udny* v. *Udny* (3) that "domicil is the condition in virtue whereof is ascribed to an individual the character of a citizen of some particular country . . . . on the basis [of which] the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy must depend." In *Bell* v. *Kennedy* Lord Westbury said this also: "Domicil . . . . is an idea of law. It is the relation which the law creates between an individual and a particular locality or country."

Uniformity of law, civil institutions existing within ascertained territorial limits, and juristic authority in being there for the administration of the law under which rights attributable to domicil are claimed, are indicia of domicil, all of which are found in the Provinces. Unity of law in respect of the matters which depend on domicil does not at present extend to the Dominion. The rights of the respective spouses in this litigation, therefore, cannot be dealt with on the footing that they have a common domicil in Canada, but must be determined upon the footing of the rights of the parties and the remedies available to them under the municipal laws of one or other of the Provinces.

The competency of the wife's suit for divorce depends, then, first, upon her power during her marriage to acquire domicil in Alberta, her husband not being domiciled there, and, secondly, upon the jurisdiction of the Supreme Court of

(1) [1919] A. C. 756. (2) (1868) L. R. 1 H. L. Sc. 307, 320.
(3) (1869) L. R. 1 H. L. Sc. 441, 457.

Alberta at her instance to change the matrimonial status of her husband. The first of these questions engaged most of the attention of counsel in the argument of the appeal. The second is also of high importance. It touches the due administration of justice and the mutual relations of self-governing communities.

Propositions of law in respect of domicil were advanced on the respondent's behalf to this effect: that the identity of the domicil of a wife with that of her husband is a legal fiction or presumption of law; that domicil depends upon the capacity in law of individuals to choose a permanent home; and that when this capacity exists in a wife by reason of judicial separation, and has in fact been exercised, the rights arising from domicil result in her favour. The mode of giving effect to such rights must, it was argued, be matter of procedure for the tribunals of the State within which domicil has been gained. A separate contention was raised upon the construction of the statute, the Matrimonial Causes Act, 1857, under which the separation here in question was decreed.

The contention that husband and wife may be domiciled apart and may resort to different jurisdictions and different codes of law to seek thereunder dissolution of the marriage between them appears to challenge directly the rule laid down in *Le Mesurier* v. *Le Mesurier* (1) in 1895, and affirmed in the House of Lords in *Lord Advocate* v. *Jaffrey* (2), that matrimonial status is governed by the law of domicil of the parties. In the former case the rule was stated by Lord Watson to be that "the domicil for the time being of the married pair affords the true test of jurisdiction to dissolve their marriage." In the latter it was epitomized by Lord Haldane in these words: "Nothing short of a full juridical domicil within its jurisdiction can justify a British Court in pronouncing a decree of divorce." Both pronouncements are declaredly founded on a principle which was stated in the judgment of Lord Penzance in *Wilson* v. *Wilson* (3): "The differences of

(1) [1895] A. C. 517. (2) [1921] 1 A. C. 146.
(3) (1872) L. R. 2 P. 435, 442.

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married people should be adjusted in accordance with the laws of the community to which they belong and dealt with by the tribunals which alone can administer those laws." The decision in *Le Mesurier* v. *Le Mesurier* (1) does not deal with the case of spouses judicially separated, and that case is expressly reserved for future decision in the opinions of the noble and learned Lords who decided *Lord Advocate* v. *Jaffrey*. (2) The judgment delivered by Lord Watson in *Le Mesurier's* case (1), however, brings inevitably into view the fact that divorce obtainable under different systems of municipal law by spouses living in separate jurisdictions is irreconcilable with the existence of any axiom in private international law that there is in the case of every marriage one sole jurisdiction in which dissolution of the marriage tie can be decreed.

It was common ground in this case that the rule propounded on behalf of the respondent has not been heretofore laid down by any express judicial decision which binds this Board. The decision under appeal was arrived at upon examination of conflicting opinions, some of them declared by distinguished judicial persons, and others expressed by eminent jurists. These opinions have received the consideration to which they are entitled.

Williams v. *Dormer* (3), which was heard in the Court of Arches in 1852, appears at first sight to be a case in point. It was cited to show that in the opinion of an eminent judge of the Ecclesiastical Courts, Sir John Dodson, divorce a mensa et thoro annulled, for the purposes of those Courts, the presumption that a wife's domicil is that of her husband. Examination of the report does not establish this proposition. The suit was a husband's suit for nullity brought in the diocese of Canterbury. There had been at an earlier date a decree of divorce a mensa et thoro at the wife's instance. A question arose as to the competence of the suit by reason that in order to found jurisdiction the actor in the suit must show the respondent to be resident within the jurisdiction of

(1) [1895] A. C. 517. (2) [1921] 1 A. C. 146.
(3) 2 Rob. Eccl. 505.

the Court whose authority was invoked. The libel as framed did not show this fact, and the husband proposed to amend it by averring that he " was and is resident at Tunbridge within the jurisdiction . . . ." and that by reason thereof " the said . . . ."—the wife—" is subject to the jurisdiction of the Court." With regard to this topic only, Sir John Dodson is reported to have used the words following (1): " Would it follow that the wife, in this case, was also resident in the same jurisdiction? Certainly not. It was properly observed by her counsel that there has been a sentence of separation from bed, board and mutual cohabitation, consequently, that the presumption of law, which usually obtains, namely, that the wife is legally domiciled where the husband has his domicil, cannot in this case prevail. On the contrary, the probability is she is resident somewhere else; and on referring to the former suit of nullity it appears that such suit was instituted in the diocesan Court of London; therefore, if her residence is to be presumed to be in any jurisdiction in particular, it would be rather in the diocese of London than in the diocese of Canterbury. I must say I consider these objections well founded, and that the defects in the libel are not removed."

The observations of the learned judge were directed solely to a question of residence within a local jurisdiction. He used the word domicil in a popular sense in relation to this topic in course of determining whether a married woman was to be presumed in point of fact to be resident in the diocese in which her husband alleged himself to have his abode. The case throws no light on the questions which have here to be determined.

Lord Brougham, in 1835, in *Warrender* v. *Warrender* (2) " left open for discussion " the question whether divorce a mensa et thoro would enable a wife to acquire a domicil of her own. The matter became, in 1859, a subject of discussion between some of the learned Lords who decided *Dolphin* v. *Robins* (3), though, as was carefully pointed out, it did not arise for decision. Adverting to the hypothetical case of a

(1) 2 Rob. Eccl. 508. (2) (1835) 2 Cl. & F. 488.
(3) 7 H. L. C. 390.

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wife separated by divorce a mensa et thoro, Lord Cranworth said (1): "The argument which goes to assert that she cannot set up a home of her own, and so establish a domicil different from that of her husband, is not to my mind altogether satisfactory." Lord Kingsdown thought it necessary to dissent even from this tentative suggestion of uncertainty. Lord Campbell withheld the expression of any opinion, as the question did not arise in the case.

In *Pitt* v. *Pitt* (2) Lord Westbury expressed a doubt such as Lord Cranworth had indicated in *Dolphin* v. *Robins* (3), and Lord Kingsdown again recorded his dissent. "I," he said, "do not share the doubts which my noble and learned friend has expressed."

The question as to which, in 1835, Lord Brougham thought it advisable in *Warrender* v. *Warrender* (4) to reserve his opinion related to the effect of the divorce a mensa et thoro under the ecclesiastical law, and the discussion in *Dolphin* v. *Robins* (3), though it occurred two years after the passage of the Matrimonial Causes Act, 1857, appears to have been directed to the same question and not to the effect of a decree of judicial separation under the statute. Lord Westbury's observations five years later in *Pitt* v. *Pitt* (2) were suggested by one of the cases of hardship which, in 1898, were more definitely considered by Sir Gorell Barnes, as he then was, in *Armytage* v. *Armytage*. (5)

Armytage v. *Armytage* (5) is one of a group of English cases in which Sir Gorell Barnes P., Sir Samuel Evans P., and Bargrave Deane J., as judges of the Divorce Division of the High Court of Justice, dealt with circumstances of hardship and asserted or exercised jurisdiction in divorce on grounds other than that of domicil of the parties. A case of *Le Sueur* v. *Le Sueur* (6), which was also mentioned in argument, was one in which Sir Robert Phillimore, in the same Division, was disposed to assume that desertion on the part of a husband would enable the wife to choose a new domicil. This assumption

(1) 7 H. L. C. 390, 416.
(2) (1864) 4 Macq. 627.
(3) 7 H. L. C. 390.
(4) 2 Cl. & F. 488.
(5) [1898] P. 178.
(6) 1 P. D. 139.

has since been held in *Lord Advocate* v. *Jaffrey* (1) to be contrary to principle. The cases relied upon were *Armytage* v. *Armytage* (2); *Ogden* v. *Ogden* (3); *Stathatos* v. *Stathatos* (4); and *De Montaigu* v. *De Montaigu.* (5) In the cases of *Armytage* (2) and *Ogden* (3) the judgments were those of Sir Gorell Barnes.

Armytage v. *Armytage* (2) is of authority for a proposition, now well established, that the jurisdiction to decree judicial separation depends upon residence and not upon domicil. In the course of his judgment Sir Gorell Barnes explicitly accepted the rule as to domicil laid down in *Le Mesurier* v. *Le Mesurier*, but appeared to specify an exception to it. "The Court," said the learned judge (6), "does not now pronounce a decree of dissolution where the parties are not domiciled in this country, except in favour of a wife deserted by her husband, or whose husband has so conducted himself towards her that she is justified in living apart from him, and who, up to the time when she was deserted or began so to be, was domiciled with her husband in this country, in which case, without necessarily resorting to the American doctrine that in such cases a wife may acquire a domicil of her own in the country of the matrimonial home, it is considered that in order to meet the injustice which might be done by compelling a wife to follow her husband from country to country, he cannot be allowed to assert for the purposes of the suit that he had ceased to be domiciled in this country."

In the later case of *Ogden* v. *Ogden* (3), the marriage in France of an Englishwoman to a domiciled Frenchman had been declared null in France, and a question of the validity of the French decree of nullity was litigated in the High Court here and in the Court of Appeal. Before the decree of nullity was obtained in France the wife had sued in England for divorce, and, on the ground of lack of jurisdiction by reason of the foreign domicil of the spouses, the suit had been dismissed by Sir Francis Jeune, as he then was.

(1) [1921] 1 A. C. 146.
(2) [1898] P. 178.
(3) [1908] P. 46.
(4) [1913] P. 46.
(5) [1913] P. 154.
(6) [1898] P. 178. 185.

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Sir Gorell Barnes, as a member of the Court of Appeal, concurred in affirming the validity of the French decree of nullity, but in the course of his considered judgment stated an opinion that a wife situated as was the wife in question might, consistently with principle, be allowed to obtain relief in the Court of her original domicil. This opinion, it is to be observed, was in conflict with the view of Lord St. Helier, who heard the wife's suit and dismissed it for want of jurisdiction. Whether it can be in part sustained, consistently with authority, may be open to discussion.

In *Stathatos* v. *Stathatos* (1) an Englishwoman had gone through a ceremony of marriage with a man of Greek domicil. In 1910 a Greek Court declared the marriage a nullity. In 1912 the wife sued in England for divorce. Bargrave Deane J., on the faith of *Armytage* v. *Armytage* (2), decreed divorce, but said: "It is undoubtedly giving the go-by to what has always been the rule of law and practice here, namely, that the wife's domicil is the husband's, whatever that may be. I should feel very much happier in the course I am going to take if I knew that my decision were coming before the Court of Appeal."

De Montaigu v. *De Montaigu* (3) was a case of hardship, where Sir Samuel Evans P., relying on the decision in *Armytage* v. *Armytage* (2), departed from the rule that jurisdiction in divorce depends upon domicil with this observation: "I think it better, where necessary, in a case like this, to make an exception from the ordinary rule that domicil governs these cases and to grant a decree as a practical way of giving [the petitioner] the redress to which she is entitled."

The doubts expressed by Lord Cranworth and Lord Westbury—and indicated by Lord Brougham—in opinions delivered by them in the House of Lords, and the views pronounced and action taken by the learned judges of the Divorce Division, involve a question not directly raised upon this appeal—namely, whether without express legislative sanction, Courts having jurisdiction in divorce may by estoppel

(1) [1913] P. 46. (2) [1898] P. 178.
(3) [1913] P. 154.

or like device ensure that one of the spouses shall not resort to a jurisdiction other than that in which both were domiciled, and invoke its powers, on the ground of domicil newly acquired within its authority, to change the status of the spouse left resident in the original place of domicil. It is not necessary on this occasion to deal specifically with that question.

In *Hastings* v. *Hastings* (1), which was heard in the Supreme Court of New Zealand in 1922, a wife resident in New South Wales had obtained a decree of judicial separation, and after the lapse of three years sued her husband in New Zealand, where he resided, to obtain dissolution of her marriage by virtue of a statute of the New Zealand Legislature. Adams J., who tried the case, thought the balance of opinion among jurists to be in favour of the view that a wife who has obtained a decree of judicial separation may acquire a domicil independently of her husband, but he dismissed the suit because—quoting the language of the report—" the husband for want of domicil owed no obedience to this Court." The case is, so far as decision goes, adverse to the respondent's contention that a wife judicially separated may proceed for divorce in the Courts of a state where her husband is not domiciled.

The cases most like in general character to the present, cited on behalf of the respondent, were a series of judgments in the Supreme Court of the United States: *Barber* v. *Barber* (2); *Cheever* v. *Wilson* (3); and *Haddock* v. *Haddock*. (4) Delivered respectively in 1859, 1870 and 1905, they embody in judicial decisions determinations of the highest authority with regard to the jurisdictional relations inter se of the States in the United States which, if they were decisions upon the law of the Canadian Dominion, the Province of Alberta, or the Canadian Provinces inter se, might be held to conclude the present inquiry in the respondent's favour. These cases, however, are primarily decisions upon questions dependent upon the constitution of the United States, the jurisdiction and procedure of the States individually,

(1) 1922, N. Z. L. R. 273.
(2) 21 Howard, 582.
(3) 9 Wall. 108.
(4) 201 U. S. 562.

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and the nature and effect of residence and domicil respectively to found jurisdiction in divorce under the laws by which the States collectively and individually are governed.

A case more nearly in point than most of those before mentioned is that of *Lord Advocate* v. *Jaffrey*. (1) Although the question of domicil which arose for decision arose with regard to a wife not separated by judicial decree, discussion took place with respect to the decision in *Le Mesurier* v. *Le Mesurier* (2), which was directed to the general question of jurisdiction in divorce, and to the grounds upon which in our law domicil and jurisdiction in divorce depend.

Lord Haldane said this in *Lord Advocate* v. *Jaffrey* (3): "Since *Le Mesurier* v. *Le Mesurier* (2) nothing short of a full juridical domicil within its jurisdiction can justify a British Court in pronouncing a decree of divorce," and this—"There can be only one real domicil"; and further—"There is no authority for the proposition that husband and wife can have, while they continue married, distinct domicil. . . . . If it were otherwise proceedings for dissolving the status of marriage might be carried through in two jurisdictions, possibly with different results."

Lord Cave said (4): "I doubt whether the rule as to a wife's domicil following that of her husband is founded only upon her obligation to live with him. It appears to me to be more correct to say that it is a consequence of the union between husband and wife brought about by the marriage tie. . . . . The rule is no doubt abrogated by a divorce a vinculo and possibly (although this has not yet been finally decided) by a divorce a mensa et thoro or a judicial separation. . . . . As to a possible exception in a case where a husband who having been guilty of desertion or some other matrimonial offence in this country, endeavours to deprive his wife of her remedy by changing his domicil, there is no doubt authority (which it is not now necessary to examine) for the proposition that in such a case the husband will not be allowed to set up his own wrong as an argument for prejudicing his wife's rights."

(1) [1921] 1 A. C. 146.
(2) [1895] A. C. 517.
(3) [1921] 1 A. C. 146, 152.
(4) Ibid. 158.

Lord Shaw said this (1): "I must not myself be held as assenting to the view that it has ever yet been decided by law that even a judicial separation properly and formally obtained would operate as a change in the so-called, and, in my opinion, very doubtfully named domicilium matrimonii. I see the greatest difficulty in any invasion of the principle which appears to me to be fundamental—namely, that that unity which the marriage signifies is regulated by one domicil and one domicil only, i.e., that of the husband. I am quite sure that Lord Watson in *Le Mesurier* v. *Le Mesurier* treated the matrimonial domicil as the real domicil and nothing but the real domicil, but considered that as the real domicil of one person—namely, the husband. Much confusion may be caused by the introduction of the idea of there being two domicils of the marriage or two domicils of succession while the marriage tie continues."

In a later passage Lord Shaw adds this: "In the great fundamental issues of status and succession the domicil of the wife is the domicil of the husband until divorce a vinculo matrimonii has been obtained."

The questions to be here decided, with such guidance in principle as may be obtainable from the opinions to which attention has thus been directed, are these: Upon what law does the jurisdiction in divorce depend in the Province of Alberta? Under that law may a married woman—the marriage subsisting—choose her own domicil irrespective of her husband's domicil? To the jurisdiction of such independent domicil of hers may she cite her husband in a suit for divorce? As to the first of these questions no dispute is possible. Upon an appeal to His Majesty in Council from Alberta in 1919, *Board* v. *Board* (2), it was ascertained that the law applicable in Alberta in respect of divorce and judicial separation, is that which is laid down for England by a statute of the Imperial Parliament, the Matrimonial Causes Act, 1857. The case therefore depends upon the true view of the general rule of law with regard to the domicil of husband and wife and the effect in respect of domicil, as

(1) [1921] 1 A. C. 146, 168. (2) [1919] A. C. 756.

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between husband and wife, of divorce a mensa et thoro and of judicial separation under the Act of 1857. For the respondent it was contended that if the decree of divorce a mensa et thoro did not, before 1857, enable a wife who obtained it to choose an independent domicil, the terms of the Matrimonial Causes Act, 1857, are such that a decree pronounced thereunder must be held to have that effect. What, then, is the nature and effect in our law of the rule as to domicil of husband and wife? How does it originate? How, if at all, is it affected by the statute of 1857?

The opinion expressed by Lord Cave in *Lord Advocate* v. *Jaffrey* (1) is in point here. "I doubt," said the noble and learned Lord, "whether the rule as to a wife's domicil following that of her husband is founded only upon her obligation to live with him. It appears to me to be more correct to say that it is a consequence of the union between husband and wife brought about by the marriage tie: see Code XII., i., 13; Stair I., iv., 9; Phillimore on Domicil, s. 40." "As the wife takes the rank so does she the domicil of her husband," is the statement of Sir Robert Phillimore, in his treatise on the "Law of Domicil," published in 1847, to which reference is made. In support of a proposition that this is the maxim of the Roman as well as of continental civilians the learned author cites the following texts of Roman law: "Item rescripserunt mulierem quam diu nupta est incolam ejusdem civitatis videri, cujus maritus ejus est, et ibi unde originem trahit non cogi muneribus fungi. (Digest 50, 1, 37.) Mulieres honore maritorum erigimus genere nobilitamus et forum ex eorum persona statuimus et domicilia mutamus." (Code XII., 1, 13, X. 40, 9.)

Underlying the English rule as to a wife's domicil is a principle of the common law, uniformly declared during six centuries before 1857, and not dependent upon any maxim of the civilians, whatever may have been its origin. Four citations may be made which set forth this rule: "Vir et uxor sunt quasi unica persona" (Bracton, De Legibus, lib. v., c. 25, s. 10); "Le baron et sa feme ne sont forsque un person

(1) [1921] 1 A. C. 146, 158.

en ley" (Littleton, Tenures s. X., 168, 291); "The husband and wife are one person in the law" (Coke, Institutes I., 112a); "By marriage husband and wife are one person in law" (Blackstone, Commentaries I., 442).

The rule thus declared was not a fiction or presumption which, within the competence of the tribunals concerned, might control procedure, but must be disregarded upon questions of substantive right. It was of unquestioned operation under the common law to an extent which is only partially indicated by the instances comprised under the title Baron and Feme in the "Table" annexed to Coke's First Institute. By this rule the wife's property was disposed of and her jurisdictional status ascertained, and it determined her situation as to domicil.

Consideration must be given to the effect of the decree of divorce a mensa et thoro in the Ecclesiastical Courts, for two reasons: Counsel for the respondent relied upon judicial dicta in relation to this decree; and the Matrimonial Causes Act, 1857, provides (ss. 7 and 16) that a decree for a judicial separation thereunder "shall have the force, consequence and effect of a divorce a mensa et thoro under the existing law" and "such other legal effects as are in this Act mentioned"—that is to say, the effects attributable to ss. 25 and 26 of the Act. The substance of the sections so mentioned is indicated in the side notes thereto: (XXV.) "In case of judicial separation the wife to be considered a feme sole with respect to property she may acquire, etc." (XXVI.); "also for purposes of contract and suing."

The terms and the effect of the sentence of divorce a mensa et thoro under the ecclesiastical law are well known. Oughton's "Ordo Judiciorum," published in 1728, sets forth (tit. CCXV.) the operative words: "Dictos N. et M. . . . . a thoro mensa ac mutua cohabitatione, atque obsequiorum conjugalium impensione, donec et quosque duxerint invicem reconciliandos, et non aliter, neque alio modo, separamus et divortiamus." The learned author states in a note that "often the word divortiamus is omitted." It is in effect redundant.

In more modern times the decree of divorce a mensa et

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thoro was expressed in English, in a form which will be found in the textbooks : see Paynter's Practice of the Ecclesiastical Courts Relative to Marriage and Divorce, 2nd ed., p. 182, and Shelford on Marriage, p. 364n. The material words are these : " We do pronounce decree and declare that the said A.B. ought by law to be divorced and separated from bed board and mutual cohabitation with the said C.B. her husband until they shall be reconciled to each other ; and we do by these presents divorce and separate them accordingly."

What is most strikingly apparent in the language of the decrees in question is the limited scope within which they purport to operate. The status of marriage remained. The decree lapsed if the parties were reconciled. The compulsory provision of maintenance by the husband to the wife during the period of separation under the name of alimony was, as the textbooks show, a mere means of enforcement by process of ecclesiastical law—in the first instance by excommunication —of marital obligations which were cognizable by the Ecclesiastical Courts : see Oughton, tit. 206 ; Ayliffe's Parergon, p. 58. Except in the last mentioned particular it is difficult to find in the decree of divorce a mensa et thoro anything more in point of operative effect than a licence to the wife which protects her from suit in the Ecclesiastical Courts for restitution of conjugal rights. The capacity of the wife to sue in the Ecclesiastical Courts invested her with no status or persona in Courts of temporal jurisdiction.

After divorce a mensa et thoro obtained by the wife the husband retained, notwithstanding the decree, whatever property of the wife, real or personal, was already vested in him by marriage, and his rights in respect of property which might accrue to the wife during the separation. If he was tenant by the curtesy of her hereditaments he remained tenant by the curtesy. The accruing income of her personalty, not secured to her separate use, accrued to him. If after divorce a mensa et thoro a legacy bequeathed to the wife became payable, it fell to the husband ; he might release it : *Stephens* v. *Totty*. (1) Upon his death—the decree of

(1) (1552) Cro. Eliz. 908.

divorce subsisting—she was, as his widow, entitled (subject to the discretion of the ordinary) to call for a grant of administration under the statute 21 Hen. 8, c. 5; and as widow she had her right of dower: *In the Goods of Davies.* (1) " A wife shall be endowed, though she was divorced a mensa et thoro ": Comyn's Digest A. 10 (1.); Coke upon Littleton, 33 p.

It is instructive to contrast the transient and limited effects of the decree of divorce a mensa et thoro with the effect of two conditions, known to the common law, which did destroy the unity in law of husband and wife—profession of religion and abjuration of the realm. These are said by Coke, in his notes to Littleton, s. 200, to dissolve the tie of marriage. Coke adds that in 8 Edw. 2 " an abjuration is called a divorce " —and he says as to each, " it is called a civil death."

The further argument on the respondent's behalf that a decree of judicial separation under the statute of 1857 so enlarges the effect of a divorce a mensa et thoro as to enable a wife so separated to acquire separate domicil depends upon implications sought to be founded upon ss. 25 and 26 of the Act of 1857. Those sections are as follows :—

" Sect. 25. In every case of judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a feme sole, and on her decease the same shall, in case she may die intestate, go as the same would have gone if her husband had been then dead; provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to be her separate property, subject, however, to any agreement in writing made between herself and her husband whilst separate.

Sect. 26. In every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries and suing and

(1) (1840) 2 Curteis, 628.

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being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant; provided that where, upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use; provided also that nothing shall prevent the wife from joining at any time during such separation in the exercise of any joint power given to herself and her husband."

Words could not well have been better chosen than those in ss. 25 and 26 to confine within precise limits the inroads intended to be made upon the pre-existing legal relationship of husband and wife. The period during which the wife separated by decree is under s. 25 to be considered as a feme sole with respect to property which she may acquire or which may devolve upon her is limited to the term "from the date of the sentence and whilst the separation shall continue." Under s. 26 the wife "whilst so separated" is to be "considered as a feme sole for the purposes of contract and wrongs and injuries, and suing and being sued in any civil proceeding." The statute does not purport to discharge the wife from her character of wife. It suspends certain obligations of matrimony. Upon a reconciliation the wife, rescinding the suspension, returns home as wife; upon a departure from the obligation of sexual continence she may as a wife be divorced a vinculo. By the practice in divorce in England, if after separation she has cause for divorce against her husband, she may require him as husband to provide for the costs of the suit in which she seeks that relief. So also, under the settled practice of the Probate Division of the High Court, upon the death of a woman judicially separated from her husband, the letters of administration granted to the next of kin have been always limited to that part of her estate which by virtue of the decree of separation vested in her as a feme sole, reserving the right of the husband to claim a grant in respect of the residue: see Tristram and Coote, Probate Practice, 15th ed., pp. 105, 106; 1 S. & T. 515; L. R. 1 P. 287.

Singular anomalies must arise in respect of the causes for divorce—strictly limited and carefully defined in the Act of 1857—if upon the true construction of the clauses relating to judicial separation a wife who is judicially separated is thereby qualified to choose an independent domicil. A husband may be, and sometimes has been, a suitor for judicial separation for cruelty or for adultery. Assuming ss. 25 and 26 to have the suggested effect with regard to domicil, it would seem to follow that a guilty wife judicially separated may by virtue of domicil acquired in a foreign jurisdiction become entitled to cite her husband to answer there a suit for divorce upon grounds sufficient by the local law but unknown in the law of his domicil. The marriage of British subjects would thus become liable to dissolution by authority to which they owe no obedience.

The contention that a wife judicially separated from her husband is given choice of a new domicil is contrary to the general principle on which the unity of domicil of the married pair depends; divorce a mensa et thoro gave no such right; and the statute of 1857 was not framed with that intention and does not effect that purpose.

Under British law one of the effects of marriage is to give to the spouses a common domicil—the domicil of the husband. Within the jurisdiction thereby arising, and by the marriage laws to which the spouses are there subject, the claims of either of them to a decree of dissolution of marriage ought to be determined. In so far as British tribunals are concerned it is a requisite of the jurisdiction to dissolve marriage that the defendant in the suit shall be domiciled within the jurisdiction. In such cases actor sequitur forum rei. This is the true effect upon the present proceedings of the rule laid down in *Le Mesurier* v. *Le Mesurier*. (1)

The appeal of the Attorney-General succeeds. There will be no order as regards costs.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Blake & Redden.*

Solicitors for respondent: *Lawrence Jones & Co.*

(1) [1895] A. C. 517.

[PRIVY COUNCIL.]

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Feb. 23.

BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED . . . } APPELLANTS;

AND

KATHLEEN PRIBBLE . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Canada (British Columbia)—Railway—Injury to Passenger—Defective Step—Action for Damages—Limitation—Construction of Private Act—Consolidated Railway and Light Company Act (Stat. of B. C., 1896, c. 55), s. 60.

A passenger on the appellants' railway, who had paid her fare, was injured in alighting owing to the defective condition of the step of the car. More than six months after the happening of the accident she commenced an action against the appellants claiming damages for negligence and recovered therein. The appellants relied on s. 60 of their Act, which provided as follows: "All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage is sustained, or if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, and the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act":—

Held, that the above section applied, and barred the action.

The application of the section could not be limited (*a*) to cases incapable of being pleaded as breaches of contract; (*b*) to cases of injuries occasioned without negligence; or (*c*) by excluding cases where injuries were occasioned by the operation and user of the railway in the course of its business.

The Canadian authorities as to similar sections imposing limitations reviewed.

Sayers v. *British Columbia Electric Ry. Co.* (1906) 12 Brit. Col. Rep. 102 disapproved.

Winnipeg Electric Ry. Co. v. *Aitken* (1921) 63 Can. S. C. R. 586 approved.

Judgment of the Court of Appeal reversed.

APPEAL (No. 51 of 1925) from a judgment of the Court of Appeal of British Columbia (February 4, 1925) affirming a judgment of Supreme Court.

* *Present:* VISCOUNT DUNEDIN, LORD SUMNER, LORD WRENBURY, LORD DARLING, and LORD SALVESEN.

The respondent, a passenger on the appellants' street railway, was injured in alighting owing to her foot catching in a hole which was improperly in the step of the car. More than six months after the injuries were sustained she commenced an action against the appellants in the Supreme Court of British Columbia. By her writ she claimed damages for negligence.

The only question upon the appeal was whether the action was barred by s. 60 of the appellants' Act—namely, the Consolidated Railway and Light Company Act (Stat. of B. C., 1896, c. 55).

The section is set out in the judgment of the Judicial Committee.

The trial judge held that the section did not apply, and entered judgment for the plaintiff for $5000. That judgment was affirmed by the Court of Appeal; McPhillips J.A. dissenting.

1925. Oct. 29, 30. *W. A. Greene K.C.* and *James Wylie* for the appellants.

Frank Gahan for the respondent.

1926. Feb. 23. The judgment of their Lordships was delivered by

LORD SUMNER. The respondent was a passenger on the appellants' street railway in the City of Vancouver, who had paid her fare and reached the end of her journey, and fell from the car as she was getting off the step at the rear of it. There was a hole in the step, which ought not to have been there, and her heel caught in it, so that, as she moved on, her foot was held. Her injuries were grave. Rather more than six months afterwards she brought her action. She recovered judgment for $5000.

The appellants pleaded that the action was statute barred by virtue of s. 60 of their statute—namely, the Consolidated Railway and Light Company Act, 1896. The trial judge, W. A. Macdonald J., relying on *Sayers* v. *British Columbia Electric Ry. Co.* (1) and *Viney* v. *British Columbia Electric Ry.*

(1) 12 Brit. Col. R. 102.

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Co. (1), overruled this objection. On appeal this was affirmed; McPhillips J.A. dissenting.

The opinion of Martin J.A., concurred in by M. A. Macdonald J.A., was this: "In view of the largely irreconcilable, as I think, state, of certain decisions, which are binding upon this Court and necessarily fetter the expression of our opinions, I think the best course to adopt is not to disturb the judgment in such doubtful conditions, but to leave it to a higher tribunal, which could do so, should it be so disposed, on a reconsideration de novo of the whole matter, which is one of considerable public importance and is now in an unsatisfactory legal state."

McPhillips J. reviewed the course and state of the authorities very fully and with much care, and concluded with the words: "I have no hesitation in arriving at the conclusion that the limitation provision (s. 60) effectively disposed of the case and that the appeal should be allowed."

As those expressions indicate, there is a long history both of statutory limitation of actions brought against railway companies and of judicial decisions upon the enactments, which requires consideration before the section in question is construed.

The section now under consideration runs as follows: "60. All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage is sustained, or if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, and the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act."

In 1896 clauses of this character had long been in use throughout Canada. Before the first general Railway Act in 1851 they had been inserted in special railway charters. They

(1) (1923) 32 Brit. Col. R. 468.

appeared in Provincial and in Dominion, in general and in private Acts. They repeatedly survived consolidation. A very common wording ran: "injury sustained by reason of the railway." It appears (see per Patterson J.A. in *Kelly* v. *Ottawa Street Ry. Co.* (1)) that this phrase was added in Canadian statutes to the older words of similar sections in English Railway Acts. This form had been restrictively interpreted in Canada in many cases. Some Courts held that such clauses did not apply to actions, which could be framed in contract; some that they did not apply, where negligence on the part of the railway company was the gist of the complaint; some held affirmatively that they refer only to the construction or maintenance of works authorized by a special Act; some negatively that they do not refer to things done in the ordinary course of business as common carriers, but only to things done by a railway company as a company exercising statutory powers. The reasoning by which the Courts arrived at these substantially similar conclusions may be stated thus. The words "sustained by reason of the railway" mean sustained, because a railway is being made or is in existence and is being maintained. They refer to the railway, not to its user, and certainly not to negligence committed on or in connection with it. Contracts, being made by a railway company voluntarily and subject to general rules of law, prescribe within themselves the terms on which they are to be performed or vindicated, and, in the absence of special stipulations, railway companies must in their contracts be subject to the same law as applies to ordinary contracting parties. Statutory provisions should not be read as extending to contracts or as giving advantages not bargained for.

The decisions had not always proceeded in perfect conformity with one another, but in the general result they agreed. They began in 1856, and, before the enactment now under discussion was passed in 1896, a limited construction of the old form of words was well settled. Indeed, until quite recent years, long after the Dominion Railway Act of 1903 adopted

(1) (1879) 3 Ont. A. R. 616, 622.

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a new wording, they do not seem to have been questioned. The authorities down to 1905 are very fully examined in *Anderson* v. *Canadian Pacific Ry. Co.* (1) and *Ryckman* v. *Hamilton, Grimsby and Beauville Ry. Co.* (2)

In particular, before 1896, the following aspects of the matter had been judicially dealt with throughout Canada and excluded from the operation of limitation sections, which were not always expressed in the same but always in similar words: accident to a passenger or his goods carried under contract: *Roberts* v. *Great Western Ry. Co.* (3), *Whitman* v. *Counties Ry. Co.* (4); actions for trespasses and other torts not necessarily arising out of the working or maintenance of the railway, such as fire spreading from land belonging to a railway company to another owner's land: *Prendergast* v. *Grand Trunk Ry. Co.* (5); libel by a railway manager in the discharge of his office: *Tench* v. *Great Western Ry. Co.* (6); trespass on the plaintiff's gravel pit by a contractor working for the defendant company: *Brock* v. *Toronto Ry. Co.* (7)

On the other hand, such limitation sections had been held to apply to running over a plaintiff's horses, which had got upon the railway line: *Auger* v. *Ontario, Simcoe and Huron Railroad Co.* (8); to injury caused by the negligent accumulation of leaves on the line of rails: *McCallum* v. *Grand Trunk Ry. Co.* (9); to injury to a person run down by a train while driving over a level crossing: *Browne* v. *Brockville and Ottawa Ry. Co.* (10), the principle being thus expressed: "by reason of the railway . . . . extends to an injury sustained on the railway by reason of the use made of it"; to injury caused to a passer-by, who jumped into a drain to avoid the defendants' car, driven at excessive speed, and so hurt himself: *Kelly* v. *Ottawa Street Ry. Co.* (11); to injury to a passenger in a train belonging to one company by the engine of another,

(1) (1889) 17 Ont. R. 747.
(2) (1905) 10 Ont. L. R. 419.
(3) (1857) 13 U. C. Q. B. 615.
(4) (1884) 17 Nova Scotia L. R. 405.
(5) (1866) 25 U. C. Q. B. 193.
(6) (1872) 32 U. C. Q. B. 452.
(7) (1875) 37 U. C. Q. B. 372.
(8) (1859) 9 U. C. C. P. 164.
(9) (1870) 30 U. C. Q. B. 122; (1871) 31 U. C. Q. B. 527.
(10) (1860) 20 U. C. Q. B. 202.
(11) 3 Ont. A. R. 616.

which came into collision with it: *Conger* v. *Grand Trunk Ry. Co.* (1); to damage by felling timber in purported pursuance of powers given to a railway by statute: *Follis* v. *Port Hope Ry. Co.* (2); *McArthur* v. *Northern, &c., Ry. Co.* (3) Again, in *North Shore Ry. Co.* v. *McWillie* (4), the opinion had been expressed (per Gwynne J.) that damage by sparks, negligently allowed to escape, was not covered by such a clause, since the cause of injury was simply negligence, not the exercise of statutory powers nor the existence of the railway itself, and, similarly, in *Reist* v. *Grand Trunk Ry. Co.* (5), it was laid down that the limitation applied to actions founded on acts of commission, not of omission or nonfeasance.

So much for the state of the law, of which the Legislature may be deemed to have had cognizance before enacting s. 60 in 1896. To this it may be supposed to have directed its attention. It is plain that the words added to the old formula in 1896 must have some additional effect attributed to them, but that effect is in dispute. They were clearly not intended to incorporate in the new legislation the effect of the decided cases, for that effect was not uniform. Furthermore, the case to be legislated for was not that of a railway company simply, but of a railway company which carried on other undertakings. The decisions since 1896 have further to be considered, for they are relevant authorities on the interpretation of the statutory language, which was accordingly used. At intervals over a considerable number of years the Courts of British Columbia have interpreted the meaning of s. 60, and their decisions are all one way. In *Sayers* v. *British Electric Ry. Co.* (6), in 1906, Duff J. adhered to the old current of authority, and charged the jury that the section did not apply to a passenger carried under contract. His reasoning was as follows. The clause refers to the company's obligations towards the public generally and towards the plaintiff as a member of that public, but not to obligations under

(1) (1887) 13 Ont. R. 160.
(2) (1859) 9 U. C. C. P. 50.
(3) (1888) 15 Ont. R. 733; (1890) 17 Ont. A. R. 86.
(4) (1890) 17 Can. S. C. R. 511.
(5) (1858) 15 U. C. Q. B. 355.
(6) 12 Brit. Col. R. 102.

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special contracts, which the plaintiff may have made as an individual for the carriage of himself or his goods. If the words " works or operations " are taken out of their context they would be conterminous with all that the company has or does and would make the mention of " the railway or tramway " otiose. They would also apply the six months' limit indiscriminately over the whole wide field of the company's authorized undertakings. To read the words separatim is enough to satisfy them all and is a suitable meaning to be adopted contra proferentes. The limitation accordingly applies to injuries by reason of (*a*) the railway, (*b*) the tramway, (*c*) works, not being the railway or the tramway, and (*d*) operations outside the railway or the tramway. To extend the words ultra would interfere with the rights of members of the public, with whom the company might voluntarily contract in the ordinary way of business. In the case of one of the companies absorbed by the present appellants—namely, the Westminster and Vancouver Tramway Co., a railway theretofore governed by the General Railway Act of the Province, s. 42—it would, inferentially and without express words, substitute therefor s. 60 of the Act of 1896, though it was considerably more favourable to the company and the Act itself was obtained by its private application to the Legislature.

The Court of Appeal affirmed this direction, and there the matter rested in British Columbia till 1923, when, in *Viney* v. *British Columbia Electric Ry. Co.* (1), notwithstanding the authority of *Winnipeg Electric Ry. Co.* v. *Aitken* (2), decided upon similar but not identical words, the Court of Appeal declared itself bound by *Sayers'* case (3), but disposed of the matter then in hand (a case of a passer-by) in favour of the railway company, on the ground that it fell in any case within the words " by reason of the tramway." In the meantime, in *British Columbia Electric Ry. Co.* v. *Turner* (4), Duff J. had declared his adherence to his former view, and Anglin J. had doubted if the section applied to a case of negligence at all.

(1) 32 Brit. Col. R. 468.
(2) 63 Can. S. C. R. 586.
(3) 12 Brit. Col. R. 102.
(4) (1917) 49 Can. S. C. R. 470.

This case was eventually decided on another Act, the Families' Compensation Act, 1911.

General legislation, however, had taken a different direction. In 1903 the Dominion Legislature, in the Consolidated Canadian Railway Act, altered the old formula, " by reason of the railway " to " by reason of the construction or operation of the railway " (s. 242), a change subsequently adopted in many public Provincial Railway Acts, notably in Ontario in 1906, in Manitoba in 1913, and in British Columbia in 1911 (cl. 194) and 1924 (cl. 218). When the case of the *Winnipeg Electric Ry. Co.* v. *Aitken* (1) was decided in the Supreme Court it was recognized as having shaken the authority of *Sayers'* case (2) by its criticisms, in spite of the fact that it is a decision upon a section contained in the Manitoba Railway Act and differently worded. The prior authorities are there fully re-examined by Anglin J. The plaintiff, a passenger in one tramcar, was injured, when about to alight, by reason of another tramcar of the same company coming into collision with it, and his action was held to fall within the limitation section—namely, s. 116. Duff J., after observing that the word " operations " presents no difficulty, goes on to say that the case of *Canadian Northern Ry. Co.* v. *Pszenicnzy* (3) has in effect overruled the construction of limitation sections generally as inapplicable to actions for breach of contract, since no valid distinction can be drawn between the contract of employment, under which Pszenicnzy was on the railway line and the contract of carriage, under which passengers travel. After a full examination of the decisions, Anglin J. concludes that on the words of the Manitoba statute the claim of the plaintiff passenger was barred by the limitation clause. For his full and weighty reasoning reference should be made to the full report of his judgment, to which, and to the judgments of his colleagues who concurred with him, their Lordships feel themselves to be much indebted.

In the result in this case the Court of Appeal of British Columbia, no doubt rightly, felt itself bound by the decisions

(1) 63 Can. S. C. R. 586. (2) 12 Brit. Col. R. 102.
(3) (1916) 54 Can. S. C. R. 36.

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of the Court in previous cases, but in view of the authorities to the contrary, especially in the Supreme Court of Canada, on cognate though not identical words, intimated, as before stated, that the present case might go farther with advantage. The question is not affected by any previous decisions of their Lordships, for in *Canadian Northern Ry. Co.* v. *Robinson* (1) their Lordships' board, holding that the limitation section in the Dominion Railway Act of 1903 did not apply to an action for discontinuance of facilities, merely observed that the words of that section—" operation of the railway "—" signify simply the process of working the railway as constructed," and in *British Columbia Electric Ry. Co.* v. *Gentile* (2) advisedly refrained from expressing any opinion touching the present matter. Though the whole point is one of mere construction of about twenty words, as to which no previous decision is binding upon their Lordships, they cannot but feel the importance of adopting a construction, if it be possible, which will harmonize the various limitation sections in common use in Railway Acts throughout Canada and, perhaps, bring to an end the difficulties arising from a conflict of decisions.

To apply the ordinary generalities as to the interpretation of statutes is in this case of even less direct assistance than usual. The Act is a private Act, but the presumption that it should be construed contra proferentes is of little weight. Even if it can be said that the section is reasonably capable of being read in two ways, neither in itself being preferable to the other as a matter of construction, it is not so clear that in 1896 the Legislature of British Columbia ought to be deemed to have meant to legislate in the sense less beneficial to the company. As a matter of Parliamentary bargain it may have been the policy of the Legislature to give liberal terms in consideration of the public advantage of the undertakings authorized by the Act, but of policy their Lordships cannot be judges. The Legislature may, of course, have desired to give as little as possible to the undertakers, but it may also have had in view the semi-public advantage to

(1) [1911] A. C. 739, 745. (2) [1914] A. C. 1034.

the enterprise of being safeguarded against groundless or exaggerated claims. Railway companies, if they need any special limitation of actions at all, need them as much and for the same reasons, whether the person suing for injuries sustained is a passenger or a passer-by. If it is just to put the passer-by under terms as to the prompt commencement of litigation, it is equally just to impose them on the passenger. In practice a limitation is more necessary in accident cases than in cases of injury to property rights inflicted by reason of the construction or maintenance of the railway, since fraud is much more possible in the former class of action than in the latter, and after a considerable lapse of time the company has little or no chance of defending itself against a charge of causing a personal accident by the negligence of its servants. Hence it might perhaps be expected that the additional words were inserted, albeit for the benefit and at the instance of the company, in order to relieve it from the disadvantages imposed by the decisions and not contra proferentes.

It is urged, on the other hand, that in the case of a private Act, as, after all, this is, the canon is invariably applicable, and, further, that in view of the very wide undertakings authorized by the Act itself, no reference to the railway or the tramway need be understood by the additional words at all. New undertakings were authorized by the Act, which required new words appropriate to them, but that was no ground for giving more extensive advantages in respect of the old undertakings, especially if such extension would have involved disregard of a long series of judicial decisions.

The Act, the benefit of which is now vested in the appellant company, authorized the Consolidated Railway and Light Co. not only to acquire and carry on the undertakings of separate tramway, railway and electric light and power undertakings, but also to construct new tramways and works, and it is contended that the new words " works and operations " may be satisfied by referring them to things done in exercise of these new powers.

It is better, therefore, to turn to the precise wording of the section itself. Two points ought first to be noticed which

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do not appear to have been dwelt upon in *Sayers'* case. (1) (1.) The verb to " operate " and the noun-substantives " operations " or " operation " occur frequently in other parts of the Act than s. 60, and always apparently in the familiar colloquial sense of carrying on the several undertakings, which the company is empowered to construct and maintain: see ss. 33, 34, 43, 48, 50, 51. Accordingly, to read the words as enumerating four separate causes, each exclusive of the others—namely, railway, tramway, works other than a railway or tramway, and operations—is inadmissible. The operations must be operations of, on, or with some railway, tramway or works, operations which may be careless or careful, and performed in either manner either under a contract or under a non-contractual duty. (2.) The collocation of the four words in s. 60, " tramway," " railway," " operations " and " works," by reason of which the injuries, to which the section applies, may be occasioned, is not a collocation of words, which are all of the same character. " Works " may probably, from the way in which the word is used in s. 51, be assigned to works for generating or using electricity. If so, the word is in pari materia with the words " tramway " or " railway," which speak for themselves. They are all physical things, constructed for use or, colloquially speaking, for " operations." This last word, on the other hand, denotes not a thing, but an activity, a use made of a thing. Those who argue that injuries occasioned by reason of the use made of a tramway or by reason of the contractual use of a tramway are not intended to come within the section, may be placed in this dilemma. Does " by reason of the tramway " extend to the tramway and also to the company's user of it or not ? Unless it does, " operations," which is a general word covering all the company's operations, must include the operations or modes of using and carrying on the tramway, and the true question comes to be, can it or can it not be predicated of the plaintiff that she was injured by reason of an operation of the company, that is, of some conduct of the company and its servants in operating the tramline with a defective car ?

(1) 12 Brit. Col. R. 102.

If it does, so that the express mention of "operations" means operations of something which is not a tramway, then decisions which confine the words "by reason of the tramway" to the construction and maintenance of the authorized works and forbid any extension to their operation must be wrong. Alternatively, if the word "operations" means the operating of the whole of the company's undertakings, tramways included, then the accident in question, occasioned by operating the tramway, is within the section, unless either injuries to a person carried under a contract or injuries occasioned by negligence are excluded. Whichever alternative is adopted, some one or more of the decisions must be disregarded. The exclusion of injuries to persons in a contractual relation with the company does not rest on any express words, but on the supposed general character and scope of limitation sections in Railway Acts. If escape is sought by contending that the section as a whole is subject to an unexpressed exception either of injuries to persons, who stand to the company in the particular contractual relation of passengers, carried for reward by undertakers, who make such carriage their business, or of injuries, occasioned by negligence of any kind or at any rate by negligence consisting in mere nonfeasance, the question at once arises what authority there is for making any such implied exception? The words, "for indemnity for," though long in use, do not appear to be used in a strict sense, for no contract to indemnify can be suggested, and they may be disregarded: but taking the relevant words, "all actions for any damage," these cannot be construed as meaning "all such actions for such damages except such as involve contracts of carriage or proof of negligence," for the language is unqualified. The section is expressed in general terms. If the action is one of the kind described, the section applies, for all such actions are within it. If the contention is rested on the benevolent policy of the Legislature towards injured persons, there is nothing to establish or to warrant the inference of such a policy. If it is rested on the general tenor of such sections in Railway Acts, the argument would import these exceptions into sections even more generally expressed, say

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in the words " by reason of the construction or operation.' This view would apply, if at all, to public Acts, to the Dominion Act, the Manitoba Act, and the British Columbia Act and to the present private Act alike. If actions, in which the right of the person carried arises out of a contract, are outside the section, then the case of *Pszeniczy* was wrongly decided. If the view be correct that " by reason of " means by reason of the thing itself and not by reason of negligence in the use of the thing, then the very numerous cases which apply these sections to running over a passer-by negligently, must be wrong, though why it should be the policy of the Legislature to be more careful of the interests of the passenger than of the pedestrian it is impossible to see. The view, that such sections impliedly exclude contractual claims from their application, leads to results so extraordinary as to be almost fatal to any implication, for it has often been pointed out that accident cases are generally capable of being pleaded either in contract or alternatively in tort. Negligence and personal trespass being the substance of the complaint, they are essentially actions independent of contract. After the most careful consideration of the matter their Lordships are of opinion that the reasoning of *Sayers'* case (1) is wrong, and that the reasoning in *Aitken's* case (2) gives true guidance to the construction of the present section. This appears to have been at the root of the adoption of the words " construction or operation " of the tramway in the Dominion Railway Act. They think that it is impossible to limit s. 60 of the appellants' Act in any of the following ways : (*a*) by applying it only to such personal injuries as are incapable of being pleaded as breaches of contract ; (*b*) by applying it only to such personal injuries as are occasioned without negligence on the part of the company or its servants ; (*c*) by applying it only to such personal injuries as are occasioned by reason of the railway or tramway, whose construction or maintenance is authorized, and not by reason of the operation or user of them in the course of the business or undertaking, which the company is authorized by statute or by charter

(1) 12 Brit. Col. R. 102. (2) 63 Can. S. C. R. 586.

to carry on. So far, then, s. 60 applies to the present claim and defeats it.

A further argument was submitted to their Lordships, which rests on the latter portion of the section. It appears in substance to be founded (inter alia) on the dissenting judgment of Davies J. in *Greer* v. *Canadian Pacific Ry. Co.* (1), following the earlier observations of Burton J. in *Kelly's* case (2): "the meaning of these words 'by reason of the railway' is to my mind rendered clear by the concluding passage of the section . . . . and confines the protection of the statute to acts of commission and not of omission." The argument is this. The cause of action is negligence, and negligence in a respect, which no statute authorizes. Accordingly, the action does not fall within the section. Dividing it, as structurally may well be done, after the words "and not afterwards" and before the words "and the defendant may plead," it was submitted that both limbs must apply to the same subject matter—namely, that named, in the first words down to "operations of the company," as the cause of action to which the section applies. The enactment is (1.) that it must be vindicated by action begun within six months, and (2.) that, if thus duly sued for, it may be answered by a particular form of plea and by proof thereunder that "the same was done in pursuance of and by authority of this Act." What is the meaning of "the same was done"? Obviously not the tramway, for a tramway is not done; it is made. The reference must be to the damage sustained by the plaintiff and done by the company, and therefore the last words of the section are definitive, a limitation of the class of action to which the whole section applies.

Grammatically, there may be a good deal to be said for this construction, but, unfortunately, it reduces the section almost to absurdity. First, if no action comes within the section except such as can be defeated by proof of the authority of the statute, surely that answer suffices and a further stipulation for a time limit is not needed. Secondly, it is not under this Act that the tramway was made, but under the special

(1) (1915) 51 Can. S. C. R. 338, 371. (2) 3 Ont. A. R. 616, 619.

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Act of the Vancouver Electric Railway and Light Co., whose system was taken over and whose powers and privileges were acquired by the Consolidated Railway and Light Co. under its incorporating Act of 1894. Thirdly, as a negligent construction or maintenance of the tramway is not authorized by this or any Act, the benefit of limitation is refused to the whole class of actions, in which a tramway company needs it most—namely, actions for the consequences or the alleged consequences of the negligence of its servants.

The argument, however, entirely depends on the assumption that the antecedent to the words " the same " is " any damage or injury sustained." If this assumption is not made, the two limbs of the section are independent of one another, though linked together by a simple copulative " and." If "the same" refers to the next preceding subject—namely, "the special matter" — the second limb only means that the defendant may (that is, if he chooses and is able to do so) prove " special matter," consisting of statutory powers given in law and an exercise of them in fact. The expression is cumbrous, but it does not in itself help to limit the class of actions, to which the whole section applies.

As their Lordships conceive, the true explanation of the latter part of the section is much simpler. The advantage of pleading the general issue is one which has been given, modified or taken away by statute in many ways and for various reasons. It is exclusively a pleading advantage and is independent of the merits of the case or the substantive defence that may be capable of being proved under it. It has a long history, going back to 7 Jac. 1, c. 5, and although from time to time this mode of pleading has been regulated by the general system of pleading in vogue, its substantive character remains unchanged, though now its utility is probably much less than it used to be.

It was a common practice in Railway Acts, long before 1896, to express in one clause both a limitation of the time for bringing actions against the company and a provision that the company might plead the general issue. In substance, nevertheless, the right to have a given class of actions

commenced within a limited period or not at all and the right to defend an action under a plea of the general issue are wholly disconnected matters. They properly fall within one chapter dealing with advantages given to the company in connection with litigation, but they are more conveniently enacted in separate sections and sub-sections than in one continuous sentence without other division than the insertion of the word " and." It is an accident that in 1896 the latter form was adopted. The Legislature of British Columbia (see Statutes of 1924, c. 218, s. 269) has adopted, for the last fifteen years, the form, at once more convenient and correct, of throwing the limitation into one sub-section and the right to plead the general issue into another, and the fact that at the same time the shortened phrase " construction or operation of the railway " is used and actions on breaches of contract express or implied, for or relating to the carriage of any "traffic," including passengers, are excluded from the section, shows that the state of the authorities had the consideration of the Legislature, and that its policy as to passengers is now expressly and authoritatively declared. Thus the ambiguity that may arise in construing such a section as s. 60 in the present case is prevented in future for actions against the Provincial railways in general.

Upon the whole case their Lordships are of opinion that the appeal succeeds and that the judgment for the plaintiff given in the action must be set aside and be formally entered for the defendant company. Their Lordships are further informed that, in consideration of her injuries and of the fact that the general aspect of the matter concerns themselves alone, the appellants have voluntarily arranged with the respondent not to ask for the repayment of any sums already paid to her in consequence of the judgments below, a liberal proceeding to the spirit and justice of which their Lordships think effect should now be given by making no order as to costs of this appeal. They will humbly advise His Majesty accordingly.

Solicitors for appellants : *Linklaters & Paines.*
Solicitors for respondent : *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.* 1926 *Feb. 25.*

NADAN . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ATTORNEY-GENERAL FOR ENGLAND AND ATTORNEY-GENERAL FOR CANADA . . . . . INTERVENERS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION.

Canada—Legislative Power—Appeal to Privy Council—Royal Prerogative to grant Leave—"Criminal Case"—Colonial Laws Validity Act, 1865 (28 & 29 *Vict. c.* 63), *s.* 2—*British North America Act,* 1867 (30 & 31 *Vict. c.* 3), *s.* 91—*Criminal Code* (*R. S. Can.*, 1906, *c.* 146), *s.* 1025.

Sect. 1025 of the Criminal Code of Canada, if and so far as it is intended to prevent the King in Council from giving effective leave to appeal against an order of a Canadian Court in a criminal case, is invalid. The legislative authority of the Parliament of Canada as to criminal law and procedure, under s. 91 of the British North America Act, 1867, is confined to action to be taken in Canada. Further, an enactment annulling the royal prerogative to grant special leave to appeal would be inconsistent with the Judicial Committee Acts, 1833 and 1844, and therefore would be invalid under s. 2 of the Colonial Laws Validity Act, 1865. The royal assent to the Criminal Code could not give validity to an enactment which was void by Imperial statute; exclusion of the prerogative could be accomplished only by an Imperial statute.

According, however, to the well settled practice of the Judicial Committee His Majesty is advised to intervene in a criminal case only if it is shown that, by a disregard of the power of legal process, or by some violation of natural justice, or otherwise, substantial and grave injustice has been done.

The appellant was convicted in Alberta of an offence under the Government Liquor Control Act of Alberta (14 Geo. 5, c. 14), which did not incorporate s. 1025 of the Criminal Code of Canada, and of an offence under the Canada Temperance Act (R. S. Can., 1906, c. 152). For each offence he was sentenced to a fine, and in default imprisonment. The Supreme Court of Alberta, rejecting contentions as to the construction and invalidity of the material sections, affirmed the convictions, but gave leave to appeal to the Privy Council. The Crown petitioned the Judicial Committee to quash the appeals as incompetent, having regard to s. 1025. The appellant petitioned for special leave to appeal. The petitions were heard with the appeals:—

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* *Present:* VISCOUNT CAVE L.C., VISCOUNT DUNEDIN, LORD SHAW LORD PHILLIMORE, and LORD BLANESBURGH.

Held, (1.) that each appeal was in a "criminal case" to which s. 1025 applied, so far as it was valid; (2.) that (in the absence of argument to the contrary) s. 1025 prevented the Appellate Division from giving effective leave to appeal; (3.) that s. 1025 did not exclude the prerogative right to give leave to appeal, but that the cases were clearly not within the category of the exceptional cases in which special leave to appeal was advised in a criminal matter.

CONSOLIDATED APPEAL (No. 24 of 1925) from a judgment of the Appellate Division of the Supreme Court of Alberta (January 7, 1925) affirming two convictions by a police magistrate in Alberta; also, heard with the appeals, petition to dismiss the appeals as incompetent, and petition for special leave to appeal.

The convictions affirmed were: (1.) Under the Government Liquor Control Act, Statutes of Alberta, 1924, c. 14, of having intoxicating liquor within the Province without having the package officially sealed; (2.) Under the Canada Temperance Act, R. S. Can., 1906, c. 152, as amended by 10 Geo. 5, c. 8, of transporting through the Province intoxicating liquor otherwise than by means of a common carrier by water or by rail. In respect of each offence the appellant was sentenced to a fine, or in default to imprisonment.

The Appellate Division (Harvey C.J., Stuart J.A. and Clark J.A.; Beck J.A. and Hyndman J.A. dissenting) affirmed the convictions, subject to an amendment of the second conviction, and gave leave to appeal to His Majesty in Council. The two proceedings in the Appellate Division are reported at 21 Alb. L. R. 193, 231.

The respondent petitioned that the appeals should be quashed or dismissed on the ground that they were not competent having regard to s. 1025 of the Criminal Code of Canada, and on the ground that the leave given was not competent having regard to the Alberta Order in Council, 1910.

The appellant petitioned for special leave to appeal.

It was ordered that the hearing of both petitions should stand over until the hearing of the consolidated appeal.

His Majesty's Attorney-General and the Attorney-General for Canada were given leave to intervene.

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1925. Dec. 10, 11, 14. The consolidated appeal having been partially opened on the merits, their Lordships desired to hear the questions arising on the petitions argued.

R. B. Bennett K.C. and *Pritt* for the respondent. The Appellate Court had no jurisdiction to give leave to appeal to the Privy Council having regard to s. 1025 of the Criminal Code of Canada. That section was intra vires under the British North America Act, 1867, s. 91, the general words and head 27 as to criminal law. The power conferred was complete: *Attorney-General for Ontario* v. *Attorney-General for Canada* (1); it included power to limit the royal prerogative in that respect. The cases were "criminal cases" within the meaning of s. 1025, even though they depended upon questions of ultra vires and of construction. Nor was it material that the first conviction was under a Provincial statute imposing penalties under the power contained in s. 92, head 15: *Rex* v. *Nat Bell Liquors.* (2) [Reference was made also to *Toronto Street Ry. Co.* v. *The King* (3); *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* (4); Interpretation Act (R. S. Can., 1906, c. 1), s. 28.]

Clauson K.C. (*T. Mathew* with him) for the Attorney-General for Canada, intervener. Sect. 1025 excludes the appeals and the right to grant special leave. The King and His Parliament of Canada have complete legislative power in the matters in respect of which legislative authority is given by the British North America Act: *Bank of Toronto* v. *Lambe* (5); *Attorney-General for Ontario* v. *Attorney-General for Canada* (6); *In re the Initiative and Referendum Act.* (7) It was therefore competent to enact that in no circumstances should a person who had been convicted of a criminal offence ask for an exercise of the prerogative right. The British North America Act, 1867, does not, as it might have done, expressly exclude the legislative power to deal with the royal prerogative. The section is not invalid under the Colonial Laws Validity

(1) [1912] A. C. 571.
(2) [1922] 2 A. C. 128, 167.
(3) [1917] A. C. 630, 637.
(4) [1903] A. C. 524, 528.
(5) (1887) 12 App. Cas. 575, 588.
(6) [1912] A. C. 571, 581.
(7) [1919] A. C. 935, 942.

Act, 1865, as conflicting with the Judicial Committee Acts, because those Acts are merely enabling Acts, and are not the source of the prerogative. The Alberta Order in Council, 1910, giving a right of appeal with the leave of the Court in Alberta, does not apply to criminal cases; if it does, the same argument applies. Further, the Colonial Laws Validity Act, 1865, ceased to operate in the matter when the British North America Act, 1867, was passed. Even if s. 1025 is ultra vires so far as it purports to deal with the prerogative right, the Judicial Committee would hesitate to advise special leave being given in a class of cases as to which the Dominion Parliament has deliberately expressed the view that there should be no appeal.

Sir Douglas Hogg A.-G. (*Giveen* with him), intervener. Sect. 1025 is not effective to deprive His Majesty of the prerogative right to grant special leave to appeal. That right can be taken away only by an Imperial Act, or by a charter or statute having the authority of an Imperial statute: *Reg.* v. *Bertrand.* (1) Precise words must be used: *Théberge* v. *Laudry* (2); *Cushing* v. *Dupuy* (3); it is, at any rate, very unlikely that, if the Imperial Legislature intended to limit the royal prerogative, it would not have used precise words. The British North America Act, 1867, therefore does not confer the power. There is no direct authority, but the following support the contention: Opinion of Lord Brougham cited in *Cuvillier* v. *Aylwin* (4), which case was overruled in *Cushing* v. *Dupuy* (5); *Reg.* v. *Edulji Bryamjee* (6); *Reg.* v. *Alloo Paroo* (7); *Townsend* v. *Cox* (8); *Attorney-General for Canada* v. *Attorney-General for Ontario* (9); *Webb* v. *Outrim* (10); Keith's Representative Government in the British Dominions, 1912 ed., vol. ii., pp. 980, 981; Wheeler's Confederation Law of Canada, 1896, p. 34; Quick and Gorran's Constitution of the Australian Commonwealth,

(1) (1867) L. R. 1 P. C. 520, 530.
(2) (1876) 2 App. Cas. 102, 106.
(3) (1880) 5 App. Cas. 409, 416.
(4) (1832) Stuart's L. C. Rep. 527; also (without the Opinion) 2 Knapp 72.
(5) 5 App. Cas. 409, 417.
(6) (1846) 5 Moo. P. C. 276.
(7) (1847) 5 Moo. P. C. 296.
(8) [1907] A. C. 514.
(9) [1897] A. C. 199.
(10) [1907] A. C. 81.

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2nd ed., pp. 60 to 62. When the Imperial Parliament intended to give authority to limit the royal prerogative, as in the case of the Australian Commonwealth and South Africa, it has done so expressly. There have been appeals to the Privy Council where s. 1025 might have been relied on, but was not: *Wentworth* v. *Mathieu* (1); *Rex* v. *Nat Bell Liquors*. (2) In other cases the question has arisen, but no decision was necessary: *Toronto Ry. Co.* v. *The King* (3); *Attorney-General for Ontario* v. *Reciprocal Insurers* (4); *Attorney-General for Ontario* v. *Daly*. (5) Further, so far as s. 1025 purports to take away the prerogative right to grant special leave it conflicts with the Judicial Committee Acts, 1833 and 1844, and is therefore invalid under the Colonial Laws Validity Act, 1865. Sect. 1025 is effective, however, to preclude any Court in Canada from granting leave to appeal: *Cushing* v. *Dupuy*. (6) The view that if s. 1025 is ineffective to take away the prerogative yet weight should be given to it upon an application for leave to appeal, is supported by *Reg.* v. *Ames*. (7)

Frank Ford K.C. and *Hon. Geoffrey Lawrence K.C.* for the appellant. The appellant adopts the argument of the Attorney-General as to the incompetence of s. 1025 to take away the right to grant special leave. Further, if the Dominion Parliament has that power, so also have the Provincial Legislatures as to penalties imposed under the British North America Act, 1867, s. 92, heads 13 and 14; for the power of a Provincial Legislature, within its sphere, is as plenary as that of the Parliament of Canada: *Hodge* v. *The Queen*. (8) By s. 101 the Parliament of Canada was given power to set up a Court of Appeal for Canada, but no mention was made of authority to take away or limit the prerogative.

In s. 1025 "criminal case" is used in the sense in which it is used in s. 91, head 27, of the British North America

(1) [1900] A. C. 212.
(2) [1922] 2 A. C. 128.
(3) [1917] A. C. 630.
(4) [1924] A. C. 328, 348.
(5) [1924] A. C. 1011, 1015.
(6) 5 App. Cas. 409.
(7) (1841) 3 Moo. P. C. 409, 413.
(8) (1883) 9 App. Cas. 117, 132.

Act, 1867; the words do not include the case under the Government Liquor Control Act, which did not adopt s. 1025. On this point *Rex* v. *Nat Bell Liquors* (1) is distinguishable, as there the Dominion Legislature was dealing with the Supreme Court, its own creation. It would be ultra vires for the Dominion to limit the right of appeal in cases arising out of a Provincial Act imposing penalties: *Attorney-General for Ontario* v. *Reciprocal Insurers*. (2) Nor is the case under the Canada Temperance Act a "criminal case"; that Act was not passed under the power as to criminal law, but under the general power to legislation for peace, order, and good government: *Toronto Electric Commissioners* v. *Snider*. (3) Even if the cases are criminal cases the Appellate Court had power under the Alberta Order in Council, 1910, to grant leave.

If special leave is necessary it should be granted, as the cases involve important questions of construction of statutes and of legislative competence.

R. B. Bennett K.C. replied.

1926. Feb. 25. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. These are appeals from two judgments of the Appellate Division of the Supreme Court of Alberta dismissing appeals against convictions by a police magistrate; and, in the course of the argument, important questions have been raised as to the royal prerogative and as to the jurisdiction of this Board.

On the night of September 29-30, 1924, the appellant, who was in the employment of a firm of carriers in Fernie, in the Province of British Columbia, was driving a motor car containing a consignment of intoxicating liquor from Fernie through the Province of Alberta to Sweet Grass, Montana, in the United States of America. Whilst in the neighbourhood of Coleman, in the Province of Alberta, in the course of this journey he was arrested by the Alberta Provincial

(1) [1922] 2 A. C. 128, 167. (2) [1924] A. C. 323, 339.
(3) [1925] A. C. 396, 406, 407.

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police; and, on the following morning, September 30, 1924, he was charged before a police magistrate at Blairmore, Alberta, (*a*) with having liquor within the Province of Alberta without the package containing the same being or having been sealed with the official seal prescribed by the Government Liquor Control Board of Alberta, contrary to the Government Liquor Control Act of Alberta (ch. 14 of the Statutes of Alberta, 1924), and (*b*) with carrying or transporting through the Province of Alberta intoxicating liquor otherwise than by means of a common carrier by water or by railway, contrary to the provisions of the Canada Temperance Act (R. S. Can., c. 152), as amended by 10 Geo. 5, c. 8. These charges were duly heard before the police magistrate, who, on October 14, 1924, convicted the appellant on both charges. On the first charge he sentenced the appellant to a fine of $200 and $7.50 costs, or in default thirty days' imprisonment with hard labour, and declared the motor car forfeited to His Majesty in the right of the Province of Alberta, the liquor being ipso facto forfeited. On the second charge he sentenced the appellant to a fine of $500 and $2 costs, or, in default, three months' imprisonment with hard labour.

The appellant carried both these decisions to the Appellate Division of the Supreme Court of Alberta, the first by an appeal by way of stated case and the second by motion by way of certiorari to quash the conviction; but that Court (by a majority) dismissed both appeals, the conviction on the second charge being amended in minor respects. By order dated February 19, 1925, the Appellate Division of the Supreme Court of Alberta granted to the appellant leave to appeal to His Majesty in Council from the judgments of that Division and to consolidate the appeals.

On May 5, 1925, the respondent presented a petition to His Majesty in Council, asking that the appeals might be quashed or dismissed as incompetent, mainly on the ground that the appeals were brought in criminal cases, and that, by virtue of s. 1025 of the Criminal Code of Canada, no Court in Canada had jurisdiction to grant leave to appeal to the King in Council in criminal cases. Some technical objections

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were also taken to the appeal. Upon this petition coming on for hearing, the questions raised were adjourned to be dealt with on the hearing of the appeals; and a petition for special leave to appeal, which had been lodged by the appellant, was adjourned in like manner.

Leave was given to His Majesty's Attorney-General and to the Attorney-General for Canada to intervene, and they have intervened accordingly and have taken part in the argument.

It is convenient before considering the merits of the appeals to deal with the questions which have been raised as to the validity and effect of s. 1025 of the Criminal Code, which runs as follows: "1025. Notwithstanding any royal prerogative, or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any court of appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard." It was argued on behalf of the appellant that neither of these appeals was brought in a "criminal case" within the meaning of the above section; but, in their Lordships' opinion, this argument cannot prevail. In each of the cases the appellant was charged with an offence against the public law, and a sentence of imprisonment could be, and was, imposed. An attempt was made to distinguish the appeal against the conviction under the Government Liquor Control Act of Alberta from the appeal against the conviction under the Canada Temperance Act on the ground that the penalties under the former statute are imposed by a Provincial statute which does not incorporate s. 1025 of the Criminal Code; but this contention appears to their Lordships to be negatived by the judgment of the Board in *Rex* v. *Nat Bell Liquors*. (1) Sect. 1025 is expressed to apply to an appeal in a criminal case from "any judgment or order of any Court in Canada," and this expression is wide enough to cover a conviction in any Canadian Court for breach of a statute, whether passed

(1) [1922] 2 A. C. 128, 167.

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by the Legislature of the Dominion or by the Legislature of the Province.

Their Lordships proceed, therefore, to consider the effect of s. 1025 on the assumption that it applies to these appeals. Having regard to the course taken by the argument, it appears that one question only falls to be decided in this case —namely, whether that section prevents the King in Council from granting special leave to appeal. The Attorney-General, who argued the case for the Crown, did not contest the view that, having regard to the provisions of s. 1025, it was not open to the Supreme Court of Alberta to give leave to appeal in this case—presumably on the ground that the Dominion Parliament, having exclusive legislative authority in respect of the procedure in criminal matters throughout Canada, had power to deprive the Canadian Courts of any jurisdiction to grant leave to appeal in those matters. In these circumstances their Lordships will assume, for the purposes of this case, that the leave to appeal granted by the Supreme Court was ineffective, and they will confine their decision to the question whether the Board can and should advise the granting of special leave to appeal.

It was suggested by the Attorney-General that, as the section provides only that "no appeal shall be brought" in a criminal case, it may be construed as applying only to appeals originating in the Dominion and not to appeals for which special leave may be granted by His Majesty on the advice of this Board. But having regard to the reference in the section to the royal prerogative, their Lordships have difficulty in putting upon it the limited construction which is suggested; and they think it right to deal with the matter upon the footing that the section was intended to apply even to appeals brought by special leave granted under the prerogative, and to consider whether the section, so far as it applies to such appeals, is or is not valid. This broad question might apparently have been raised in *Wentworth* v. *Mathieu* (1); *Townsend* v. *Cox* (2); and *Rex* v. *Nat Bell Liquors* (3);

(1) [1900] A. C. 212. (2) [1907] A. C. 514.
(3) [1922] 2 A. C. 128.

but for some reason it was not in fact raised in those cases. In *Toronto Ry. Co.* v. *The King* (1) and *Attorney-General for Ontario* v. *Daly* (2) the point was raised; but as the appeals failed on other grounds it became unnecessary to decide it. It is very desirable that a decision upon the question should now be reached.

The practice of invoking the exercise of the royal prerogative by way of appeal from any Court in His Majesty's Dominions has long obtained throughout the British Empire. In its origin such an application may have been no more than a petitory appeal to the Sovereign as the fountain of justice for protection against an unjust administration of the law; but if so, the practice has long since ripened into a privilege belonging to every subject of the King. In the United Kingdom the appeal was made to the King in Parliament, and was the foundation of the appellate jurisdiction of the House of Lords; but in His Majesty's Dominions beyond the seas the method of appeal to the King in Council has prevailed and is open to all the King's subjects in those Dominions. The right extends (apart from legislation) to judgments in criminal as well as in civil cases: see *Reg.* v. *Bertrand.* (3) It has been recognized and regulated in a series of statutes, of which it is sufficient to mention two—namely, the Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41), and the Judicial Committee Act, 1844 (7 & 8 Vict. c. 69). The Act of 1833 recites that "from the decisions of various courts of judicature in the East Indies and in the Plantations, Colonies and other Dominions of His Majesty abroad, an appeal lies to His Majesty in Council," and proceeds to regulate the manner of such appeal; and the Act of 1844, after reciting that "the Judicial Committee, acting under the authority of the said Acts [the Act of 1833 and an amending Act] hath been found to answer well the purposes for which it was so established by Parliament, but it is found necessary to improve its proceedings in some respects for the better despatch of business and expedient also to

(1) [1917] A. C. 630. (2) [1924] A. C. 1011.
(3) L. R. 1 P. C. 520.

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extend its jurisdiction and powers," enacts (in s. 1) that it shall be competent to Her Majesty by general or special Order in Council to " provide for the admission of any appeal or appeals to Her Majesty in Council from any judgments, sentences, decrees or orders of any Court of justice within any British Colony or Possession abroad." These Acts, and other later statutes by which the constitution of the Judicial Committee has from time to time been amended, give legislative sanction to the jurisdiction which had previously existed.

Under what authority, then, can a right so established and confirmed be abrogated by the Parliament of Canada ? The British North America Act, by s. 91, empowered the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to matters not coming within the classes of subjects by that Act assigned exclusively to the Legislatures of the Provinces ; and in particular it gave to the Canadian Parliament exclusive legislative authority in respect of " the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters." But however widely these powers are construed they are confined to action to be taken in the Dominion ; and they do not appear to their Lordships to authorize the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal. Further, by s. 2 of the Colonial Laws Validity Act, 1865, it is enacted that " any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament or having in the Colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative." In their Lordships' opinion s. 1025 of the Canadian Criminal Code, if and so far as it is intended to prevent the Sovereign in Council from giving effective leave to appeal against an order of a Canadian Court, is repugnant

to the Acts of 1833 and 1844 which have been cited, and is therefore void and inoperative by virtue of the Act of 1865. It is true that the Code has received the royal assent, but that assent cannot give validity to an enactment which is void by Imperial statute. If the prerogative is to be excluded, this must be accomplished by an Imperial statute; and in fact the modifications which were deemed necessary in respect of Australia and South Africa were effected in that way: see Commonwealth of Australia Act, 1900, s. 74, and Union of South Africa Act, 1909, s. 106.

Before parting with this question, it is desirable to consider certain previous decisions of the Board upon which arguments have been based. In *Cuvillier* v. *Aylwin* (1) the Legislature of Lower Canada having passed an Act limiting the right of appeal to His Majesty in Council, the Board gave effect to that Act by refusing to hear an appeal which was in contravention of it; but, as has been pointed out in later cases, the Act of the Legislature of Lower Canada there in question was expressly authorized by the British Act of Parliament commonly called the Canada Act (31 Geo. 3, c. 31), which empowered the Legislature of Lower Canada to limit and define the right of appeal: see 5 Moo. P. C. 294, 304; 15 Moo. P. C. 193; and 5 App. Cas. 417. In *Reg.* v. *Ames* (2) a Jersey ordinance having declared that no appeal was admissible in criminal cases, Baron Parke, speaking for this Board, declined to admit that the Board had not power to advise His Majesty to allow an appeal. In *Reg.* v. *Eduljee Byramjee* (3) effect was given to a provision in the Bombay Charter of 1823 authorizing the Supreme Court of Judicature of Bombay to deny an appeal to any party aggrieved by a decision of that Court; but it was pointed out that the charter was granted under the express authority of an Act of the British Parliament (4 Geo. 4, c. 71) and that its provisions were valid on that ground. The same observation applies to the case of *Reg.* v. *Alloo Paroo* (4), where the point was further discussed in the judgment of Lord Brougham.

(1) 2 Knapp 72.
(2) 3 Moo. P. C. 409.
(3) 5 Moo. P. C. 276.
(4) 5 Moo. P. C. 296.

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In *Théberge* v. *Laudry* (1), where the Legislature of Quebec, in creating a special tribunal for the trial of election petitions, had declared that the judgments of that tribunal should not be susceptible of appeal, it was held that this provision prevented an appeal to His Majesty in Council; but Lord Cairns, in declaring the decision of the Board to that effect, rested the decision upon the peculiar character of the enactment, and held that it was the intention of the Quebec Legislature, when creating a special tribunal, not to create it with the ordinary incident of an appeal to the Crown. In *Cushing* v. *Dupuy* (2) the Board, while holding that the Dominion Parliament in creating a tribunal for dealing with the subjects of bankruptcy and insolvency had power to declare the decisions of that tribunal to be final, held also that the enactment did not derogate from the prerogative of the Sovereign to allow such appeal as an act of grace. Sir Montagu Smith, in declaring the decision of the Board, reviewed *Cuvillier* v. *Aylwin* (3) and other cases. In *Wi Matua's Will* (4) it was held by this Board that the royal prerogative could not be excluded, even by Imperial statute, except by express words. In *Webb* v. *Outrim* (5), where it was argued that the Commonwealth Judiciary Act of Australia had indirectly prevented an appeal to His Majesty in Council, this Board held that the Commonwealth Parliament had no authority to pass an enactment having that effect; and Lord Halsbury in his judgment, given on behalf of the Board, expressed agreement with the statement of Hodges J. in the Supreme Court of Victoria that "in such an important matter direct authority would be given or none at all," and with the following passage from the judgment of the same learned judge: "If the Federal Legislature had passed an Act which said that hereafter there shall be no right of appeal to the King in Council from a decision of the Supreme Court of Victoria in any of the following matters, and had then set out a number of matters, including that now under

(1) 2 App. Cas. 102.
(2) 5 App. Cas. 409.
(3) 2 Knapp, 72.
(4) [1903] A. C. 448.
(5) [1907] A. C. 81.

consideration, I should have felt no doubt that such an Act was outside the power of that Federal Legislature. And, in my opinion, it is outside their power to do that very thing in a roundabout way."

In the case of *In re Initiative and Referendum Act* (1), Lord Haldane, in declaring the judgment of the Board, referred to "the impropriety in the absence of clear and unmistakable language of construing s. 92 as permitting the abrogation of any power which the Crown possesses through a person directly representing it"; an observation which applies with equal force to s. 91 of the Act of 1867 and to the abrogation of a power which remains vested in the Crown itself. Upon a review of these authorities, it appears to their Lordships that they contain nothing inconsistent with the conclusion which their Lordships have reached upon principle, and that, so far as they go, they support that conclusion.

It remains to consider whether in the case of the two judgments now under consideration His Majesty should be advised to grant special leave to appeal. Their Lordships have no hesitation in answering this question in the negative. It has for many years past been the settled practice of the Board to refuse to act as a Court of criminal appeal, and to advise His Majesty to intervene in a criminal case only if and when it is shown that, by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done. This practice and the reasons for it were clearly explained in the above-cited case of *Reg.* v. *Eduljee Byramjee* (2), where Dr. Lushington pointed out the extreme inconvenience which would arise from permitting a long series of appeals from decisions in criminal cases. This view has been repeated and enforced in a number of later cases, such as *Falkland Islands Co.* v. *The Queen* (3); *Reg.* v. *Dillet* (4); *Arnold* v. *The King-Emperor* (5); *Ibrahim* v. *The King* (6); and *Dal Singh* v. *The King-Emperor.* (7)

(1) [1919] A. C. 935, 943.
(2) 5 Moo. P. C. 276, 289.
(3) (1863) 1 Moo. P. C. (N. S.) 299.
(4) (1887) 12 App. Cas. 459.
(5) (1914) L. R. 41 I. A. 149.
(6) [1914] A. C. 599.
(7) (1917) L. R. 44 I. A. 157.

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Their Lordships have not left out of mind the consideration that the learned judges in the Supreme Court of Alberta deemed these cases to be the proper subjects of appeal. But notwithstanding this, their Lordships must be guided by the established principle which applies with full force to the present application.

The present appeals are clearly not within the category of exceptional cases in which leave to appeal would be advised by this Board. The appellant has been convicted (*a*) of having liquor within the Province of Alberta without the package containing it being sealed with the official seal, and (*b*) of transporting through the Province of Alberta intoxicating liquor otherwise than by means of a common carrier by water or by rail. The former conviction is questioned on grounds relating to the construction and validity of certain sections of the Government Liquor Control Act of Alberta and the Liquor Act of that Province, and the second conviction is questioned for similar reasons connected with the Canada Temperance Act. The arguments of the appellant on these points, which in the case of the former conviction were twenty-two and in the case of the latter fourteen in number, were fully heard by the Appellate Division of the Supreme Court of Alberta and were dealt with by the learned judges of that Division in reasoned judgments; and there can be no possible question of a disregard of the forms of legal process or the violation of any principle of natural justice. It is of the utmost importance that a decision on a criminal charge so reached should take immediate effect without a long drawn out process of appeal, and it is undesirable that appeals upon such decisions should be encouraged by the Board.

For these reasons their Lordships will humbly advise His Majesty that these appeals and the two petitions should be dismissed, but (in the circumstances) without costs.

Solicitors for appellant: *Lawrence Jones & Co.*

Solicitors for respondent: *Blake & Redden.*

Solicitors for interveners: *Treasury Solicitor and Charles Russell & Co.*

[PRIVY COUNCIL.]

HIRJI MULJI AND OTHERS . . . . APPELLANTS;

AND

CHEONG YUE STEAMSHIP COMPANY, LIMITED . . . . . RESPONDENTS.

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Explained. BRITISH MOVIETONEWS LD. *v.* LONDON AND DISTRICT CINEMAS LD. [1952] A.C. 166

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

Arbitration—Jurisdiction of Arbitrator—Submission of Disputes arising out of Contract—Charterparty—Executory Contract—Frustration—Effect of Frustration.

By a charterparty made in November, 1916, the respondents agreed to place their steamship at the disposal of the appellants at Singapore on March 1, 1917, and the appellants agreed to employ her on specified terms for ten months from the date when she was delivered to them. The charterparty contained a clause by which all disputes arising out of the contract were submitted to arbitration in Hong Kong. The ship was requisitioned by the Government before March 1, 1917, and was not released until February, 1919. The appellants then refused to take delivery of her. An arbitrator awarded the respondents damages for breach of contract, and they brought an action upon the award:—

Held, that there had been in 1917 a frustration of the charterparty which forthwith brought to an end the whole contract, including the submission to arbitration, and that consequently the contract being executory the arbitrator had not jurisdiction.

The legal effect of the frustration of a contract does not depend upon the intention of the parties, or their opinions or even knowledge, as to the event which has brought about the frustration, but upon its occurrence in such circumstances as to show it to be inconsistent with the further prosecution of the adventure.

Sanderson & Son v. *Armour & Co.* 1922 S. C. (H. L.) 117 and *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co.* [1923] A. C. 480 distinguished.

Judgment of the Supreme Court reversed.

APPEAL (No. 4 of 1925) from a judgment of the Supreme Court of Hong Kong (February 16, 1924), affirming a judgment of the Chief Justice (January 12, 1923).

The action was brought by the respondents in the Supreme Court of Hong Kong claiming $164,849 (Hong Kong currency) under an award dated March 27, 1920. The award purported to be made under a submission in a time charterparty dated November 17, 1916.

* *Present:* VISCOUNT DUNEDIN, LORD SUMNER, and LORD WRENBURY.

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The circumstances in which the award was made appear from the judgment of the Judicial Committee.

The arbitration clause was as follows: "38. That any dispute arising under this charter shall be referred to the arbitration of two persons in Hong Kong, one to be nominated by owners' agents, and the other by the charterers, and in case such arbitrators shall not agree, then to the decision of an umpire, who shall be appointed by the said arbitrators, and the award of the said arbitrators or umpire shall be final and binding upon both parties hereto."

The award recited the material terms of the charterparty; that the ship had been taken over under a requisition on March 31, 1917, before the charterers had taken delivery; that there were letters between the owners and the charterers, dated April 5 and May 13, 1917, whereby, as the award stated, the charterers entered into a subsequent agreement to take delivery when the ship was released, which was incorporated in the charterparty. The arbitrator awarded that the charterers by their letter of May 13, 1917, had confirmed the charterparty as from the date of the release, that they had refused to take delivery, and that the respondents were entitled to $162,584 damages; he also awarded them the costs of the arbitration.

The action was tried by the Chief Justice (Sir W. Rees Davies) who gave judgment for the plaintiffs.

The Full Court (the Chief Justice and Gompertz J.; Sir Skinner Turner J. dissenting) dismissed an appeal. The appeal is reported at 19 Hong Kong L. R. 12.

1925. Nov. 3, 5, 6. *Jowitt K.C.*, *Porter K.C.* and *Geoffrey Shaw* for the appellants.

Clauson K.C. and *A. C. Nesbitt* for the respondents.

The arguments and the cases referred to appear from the judgment.

1926. Feb. 25. The judgment of their Lordships was delivered by

LORD SUMNER. In this case the respondents, owners of the steamship *Singaporean*, sued in the Supreme Court of Hong

Kong on an award made there in their favour by a single arbitrator. Notice had been given to the charterers, the present appellants, that the respondents claimed arbitration upon a dispute alleged to arise under a time charter made between them on November 17, 1916, and had named their arbitrator. This notice they disregarded, and, no second nomination having been made, the respondents proceeded before their own arbitrator, who made this award on the information which they laid before him. It was not contended before their Lordships that this procedure was not regular and in accordance with the local ordinances dealing with the subject.

The charterparty provided that the *Singaporean* should be placed at the appellants' disposal on March 1, 1917, at Singapore, and should be employed by them for ten months in sundry specified trades. It contained the usual terms, including a cancelling clause, an arbitration clause, and a clause providing that the charter should be construed and governed by "British" law.

Shortly before the time at which the ship was to have entered upon the performance of the charter, she was requisitioned on behalf of His Majesty's Government. For some reason the shipowners thought that after a few months she would be again placed at their disposal, and on April 5, 1917, they wrote to the charterers to ask whether they would be prepared to take up the charter after the release of the vessel. The charterers, whether on independent information of their own or on these expressed anticipations of the owners, replied on May 12 that they would require the steamer when released. Some correspondence passed in the autumn, which showed that the charterers then desired to know when the ship would be free, and that the shipowners were unable to find this out. Then there followed a long silence. From October 11, 1917, to March, 1919, no communication passed between the parties.

The *Singaporean* continued in Government service until late in February, 1919. On March 2, 1919, the shipowners' agents informed the charterers of her release, and asked who would take delivery of the ship on their behalf at Singapore.

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The charterers replied on March 4 that it was now useless to offer delivery, giving as their reason that the charter had long expired. To this contention they adhered until and at the trial, when it was decided against them by the Chief Justice, who gave judgment for the plaintiffs in the action.

By the charterparty the ten months for which it was to be in force did not run from any specified date, but from the time at which the ship was placed at the disposal of the charterers. It was clearly a misapprehension on the charterers' part to say simply that the charter had expired by effluxion of time. The trial judge, on the other hand, says that an admission was made before him that the correspondence amounted to an exercise of the cancelling option in favour of maintaining the charterparty. This must be a mistake, for the only option mentioned is an option to cancel, and a decision to maintain the charter would not be an exercise of any option under this clause. Nevertheless he made use of this to support his view, repeated by him on the appeal, but with some hesitation, that, by affirmatively electing not to cancel the charter, when March 1, 1917, passed without the ship being placed at their disposal, the charterers, who had full knowledge of the fact of the requisition, so conducted themselves as to oust the doctrine of frustration. He thought that they must be deemed to have relied on arrangements of their own to provide for such a case, so that no implication could arise. The charterers had agreed to take the ship, and therefore were ready to protect themselves.

This view may be shortly disposed of. Their Lordships think that on the facts it was untenable, and in argument before them it was not supported. The cancelling clause clearly was never put into operation by the charterers, and the term of the charter therefore remained unaffected by it. Counsel admitted before the Board, and rightly on the materials, that the communications which passed on April 5 and May 12, 1917, did not amount to a new contract or in any way vary the contract contained in the charterparty. No new promise was made nor, if there had been any new promise in form, was there any consideration to support it.

The parties were over sanguine. If they thought that the delay would not frustrate the charter, events showed that they were wrong, and their error left their position unaffected.

On appeal to the Full Court there was a considerable divergence of opinion among the judges (see 19 Hong Kong L. R. 12), the appeal being eventually dismissed by a majority (the Chief Justice and Gompertz J.; Sir Skinner Turner J. dissenting).

The case made by the appellant charterers was throughout that the arbitrator had no jurisdiction. The claim made against them, with which he had purported to deal, could not be said to be a dispute "arising under this charter" in the words of the clause, seeing that, before it was made or any question arose, the whole charter had come to an end by frustration of its objects in consequence of the requisitioning of the ship. The shipowners supported the view above set out, and, further, said (in addition to points arising out of the state of the pleadings, which are not now material), that there had been no frustration, and that, even if this were not so, the clause continued to apply and was a submission effective to give the arbitrator jurisdiction. On this point, on which he had expressed no opinion at the trial, the Chief Justice agreed with Gompertz J. on the appeal. Their conclusion, as expressed in the judgment of the latter learned judge, may be thus summarized. Frustration of a contract depends upon the express and implied terms of the contract itself. Such a question is therefore within a clause which refers "any dispute under the contract" to arbitration. Here the decision is not on a point collateral to the merits—the finding is on the merits—and on the very matters as to which the parties have agreed that the award should be final. Many authorities were cited, and much reliance was placed on *Scott & Sons* v. *Del Sel* (1), of which, unfortunately, the Court had only a brief note and not the full report before them. Sir Skinner Turner held that the contract having been still executory when the requisition occurred, the effect on the contract was that its object was frustrated by the

(1) 1923 S. C. (H. L.) 37.

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delay caused thereby, and consequently the whole charter, including the arbitration clause, had come to an end before the shipowners raised their claim that it was still in force.

Upon the question of frustration the case is a typical one, and is governed both in its facts and its law by the *Bank Line* v. *Arthur Capel & Co.* (1) A great many charterparties have been dealt with during the last few years on indistinguishably similar facts, and have been held to have been frustrated by reason of the requisition. The facts of the present case are a fortiori to those in the *Bank Line* case, and no Court of law could have held upon them that the charter had not been frustrated at latest when, in the latter part of 1917, it had become plain that the first expectations of a speedy release of the ship were unfounded.

The arbitrator thought otherwise. His award is not clearly expressed, no doubt owing to the fact that only one party appeared before him, but their Lordships do not think that any objection can be reasonably taken to its form. It means that the charterparty had not been frustrated at all. So regarded, it was wrong in law and fact.

As the arbitrator was the judge, if at all, both of law and fact, the sole question is whether he had any jurisdiction to decide, as he purported to do, between the parties. This depends on the question whether or not there was any submission, and that again on the question whether, at the time when it purported to be submitted to him, there was a dispute, subsisting between the parties, "under this charter," that is, a contract then subsisting.

That a person before whom a complaint is brought cannot invest himself with arbitral jurisdiction to decide it is plain. His authority depends on the existence of some submission to him by the parties of the subject matter of the complaint. For this purpose a contract that has determined is in the same position as one that has never been concluded at all. It founds no jurisdiction.

Lord Parker of Waddington sums up this subject in *Produce Brokers' Co.* v. *Olympia Oil and Cake Co.* (2) in the following

(1) [1919] A. C. 435. (2) [1916] 1 A. C. 314, 327.

words: "The arbitrator cannot make his award binding by holding, contrary to the true facts, that the question which he affects to determine, is within the submission. . . . . Where, however, the submission is contained in the contract it may be a question of construction whether such expressions as 'all disputes arising under this contract' include questions as to the ambit of the submission itself. Prima facie, I do not think that they would." "A Court," says Lord Loreburn in the same case (1), "will decide for itself whether an inferior Court has clothed itself with jurisdiction by an erroneous finding on something vital to the jurisdiction": see, too, *Attorney-General for Manitoba* v. *Kelly*. (2) Accordingly, if it be the law that when a contract is frustrated it is brought forthwith to an end as regards matters thereafter arising, and if it was the fact that the contract had so come to an end before 1919, when for the first time an offer of the ship for service was effectively made, then the arbitrater could not clothe himself with jurisdiction by finding that there had been no frustration at all.

With regard to the reasoning of the majority in the Court below, their Lordships must observe, with very great respect, that they hardly appreciated the difference, which is made by holding that the entire charter had come to an end. An arbitrator under an ordinary arbitration clause may have jurisdiction to construe the contract, which contains the submission, and to find for or against trade customs said to be incorporated with it: *Produce Brokers'* case (3), or to adjudicate upon breaches of a contract, partly or wholly performed, but still in existence, for the purpose of awarding damages for such breaches already committed, even though it is determined as regards future performance by repudiation on one side and acceptance on the other: *Sanderson & Son* v. *Armour & Co.* (4); *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co.* (5) This proposition is quite different from saying that a dispute, which might have arisen

(1) [1916] 1 A. C. 322.
(2) [1922] 1 A. C. 268, 276.
(3) [1916] 1 A. C. 314.
(4) 1922 S. C. (H. L.) 117.
(5) [1923] A. C. 480.

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under the contract containing the submission, if it had not come to an end without fault on either side, is a dispute submitted thereunder, when the contract itself no longer exists. *May* v. *Mills* (1), though alluded to, was disposed of by assuming that it only excluded from the submission matters collateral to the main issue. Their Lordships venture to think that the question whether there is jurisdiction is not collateral; it is essential and fundamental, though, if the point is once got over, the merits may bulk so large as to make it seem a minor matter.

The respondents raised before their Lordships two somewhat refined arguments, to which their Lordships trust no real injustice is done by the following summary. The doctrine of frustration rests upon a term or a condition implied in the contract. In contemplation of law the parties, if they had anticipated and had taken into consideration the events which ultimately frustrated the object of their adventure, would have made provision for it, and, again in contemplation of law, the legal operation of those events upon the contract is the very thing for which that term would have provided. Hence, in implying that term to give a foundation for a legal conclusion, the law is only doing what the parties really (though subconsciously) meant to do themselves. Accordingly, the respondents asked why must one mode of dealing with an unanticipated event be adopted rather than another? At any rate, why should not an arbitrator, in passing upon the questions raised by the implication, adopt a conclusion not in all respects identical with the decision in the *Bank Line* case? (2) If, for example, he thought that the parties would have said (had they thought of it) that the contract should continue after the happening of the event, at least so far as to submit to his arbitration the question whether or not there had really been any frustration at all, would he not have been competent to do so? Or, putting it in another way, if the term which he thought fit to imply had been that in the event of frustration the contract as a whole should not be void, but that the parties should merely be relieved

(1) (1914) 30 Times L. R. 287. (2) [1919] A. C. 435.

from further performance of acts, which under the charter they severally undertake to do, if so, must the Court not intend that his award was based on this kind of view and accordingly support it ut res magis valent quam pereat ?

The alternative argument was that, even if frustration occurred and so brought the contract to an end, the arbitration clause is not one of those matters which are affected by the event or are frustrated. On the contrary, it is precisely such an event that requires the continuance of the agreement to refer, so that, in case of difference as to the character of the event or the date from which frustration must be deemed to have arisen, the conventional tribunal originally provided may be available for its solution. Though further performance is excused, how is this contract discharged, unlimited as it is in time ?

All these arguments, it will be seen, resolve themselves, on examination, into the fundamental inquiry, whether in law and fact frustration had been brought about before any dispute arose with regard to frustration or its cause or its consequences. The arbitration clause is but part of the contract and, unless it is couched in such terms as will except it out of the results, which follow from frustration, generally, it will come to an end too. This must be so, if the law is, that the legal effect of frustration is the immediate termination of the contract as to all matters and disputes which have not already arisen.

Throughout the line of cases, now a long one, in which it has been held that certain events frustrate the commercial adventure contemplated by the parties when they made the contract, there runs an almost continuous series of expressions to the effect that such a frustration brings the contract to an end forthwith, without more and automatically. They are too numerous to be cited exhaustively, but there are few expressions to the contrary and none in recent cases. By way of illustration, reference may be made only to the following.

In *Jackson* v. *Union Marine Insurance Co.* (1), at one end

(1) (1874) L. R. 10 C. P. 125, 145.

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of the series, Bramwell B., delivering the judgment of the majority in the Exchequer Chamber, describes the result of what happened by the words "the contract is at an end." In *Tamplin's* case, at the other, Lord Loreburn says (1) that, if the parties had considered the matter when making the contract, "they would have said 'if that happens, of course, it is all over between us.' Accordingly, the implied term as to frustration may be expressed in these words." "The contract," says Lord Haldane (2), "must be looked upon as being wholly dissolved and the Courts cannot take any course which would in reality impose new and different terms on the parties. . . . . The Court of Appeal below gave judgments to the effect that the contract remained in existence, and that the 'restraint of princes' clause kept the contract alive. . . . . I think that the entire contract was avoided. . . . . The contract is gone and the clause with it." A statement of the general principle by Lord Parker of Waddington is expressed in the same case as follows (3): "The principle which really underlies all cases, in which a contract has been held to determine upon the happening of an event which frustrates the object which the parties have in view, ... applies also to charterparties, where some commercial adventure contemplated by the parties . . . . is brought to an end. . . . . It was easy to imply a condition that, if the voyage became impossible of completion within that season, the contract should be at an end." Finally, in *Bank Line* v. *Arthur Capel & Co.* (4), Lord Finlay sums up the law in these words: "The doctrine that a contract may be put an end to by a vital change of circumstances has been repeatedly discussed. The law of the subject is well settled . . . . the doctrine of frustration of the adventure as terminating the contract. . . . . Neither of these clauses (26 and 31) can have the effect of preventing the termination of the charterparty by the requisition."

That requisition, or at any rate requisition for so long as showed that it was to endure for a considerable though indefinite time (whichever be regarded, in fact, as the event

(1) [1916] 2 A. C. 397, 404.
(2) Ibid. 407, 410, 412.
(3) [1916] 2 A. C. 424.
(4) [1919] A. C. 435, 441.

defeating the adventure), of itself terminates the charter and all its parts as soon as it happened, is a conclusion which, though warranted and binding in view of these and other passages, does not depend merely on the language, which a long sequence of the highest authorities have happened to use. It rests on principle, and is the only way of reconciling the special rule as to frustration with the general rules as to the obligation of contracts.

An event occurs, not contemplated by the parties and therefore not expressly dealt with in their contract, which, when it happens, frustrates their object. Evidently it is their common object that has to be frustrated, not merely the individual advantage which one party or the other might have gained from the contract. If so, what the law provides must be a common relief from this common disappointment and an immediate termination of the obligations as regards future performance. This is necessary, because otherwise the parties would be bound to a contract, which is one that they did not really make. If it were not so, a doctrine designed to avert unintended burdens would operate to enable one party to profit by the event and to hold the other, if he so chose, to a new obligation. Lord Blackburn (*Dahl* v. *Nelson, Donkin & Co.* (1)) summarizes the effect of *Jackson's* case (2) in these words: " A delay in carrying out a charter-party, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end." It should be noted that, although at first sight this right to consider the contract as " at an end " might seem, from this language, to be in the option of either party but not to arise till that option is exercised, this is not really the gist of the opinion. The passage gives the effect of two cases: *Geipel* v. *Smith* (3) and *Jackson* v. *Union Marine Insurance Co.* (2) In both cases there had been an actual refusal to perform after the event in question

(1) (1881) 6 App. Cas. 38, 53. (2) L. R. 10 C. P. 125.
(3) (1872) L. R. 7 Q. B. 414.

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happened, in the former by the shipowner and in the latter by the charterer, and in each case the formal question was whether the refusal could be justified, but there is nothing in Lord Blackburn's language to support the view that the contract does not terminate till a party to it says so. Lord Blackburn himself had said when a party to the judgment in *Geipel* v. *Smith* (1): "It is possible that the blockade might be raised within a reasonable time. . . . . If the defendants chose to run the risk and, in the event, turn out right, they are in the same position as if they had waited the reasonable time and had then sailed away," a passage which strongly supports the principle, that it is the event that frustrates, though time may be required in order to appreciate its effect on the contract, the event in such a case as the present being requisition for a time inconsistent with the objects of the adventure. Brett J. puts the principle thus in *Jackson's* case (2) in the Common Pleas: "Where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have *any* application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made." When this was affirmed in the Exchequer Chamber, Bramwell B., speaking of the exception of "perils of the seas," says (3): "The words are there—what is their effect? I think this: they excuse the shipowner, but give him no right. The charterer has no cause of action, but is released from the charter. When I say *he* is, I think *both* are." Again, in *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (4), Lord Watson's extempore phrase, "Such delay in the prosecution of her voyage as entitled the charterer to determine the adventure," is explained, partly by the fact that the charterer had done so, and partly by comparing with it Lord Halsbury's language (5): "It underlies the whole

(1) L. R. 7 Q. B. 414.
(2) (1873) L. R. 8 C. P. 572, 581.
(3) L. R. 10 C. P. 125, 144.
(4) [1897] A. C. 609.
(5) Ibid. 611

judgment of Collins J., that the right to insist upon payment of the insurance money, as upon a total loss of the freight, was consummate at the moment the main shaft broke. Now, there is a fallacy underlying that form of argument—namely, that there must be a sufficiently ascertained form of damage to show at once that the loss must have accrued because the damage was of such a character that it could not be repaired in time. The facts here have been ascertained, and we know why the freight was lost. Why was it ? Not *simpliciter*, but because the main shaft was broken under special circumstances—that is, at a distance from any place where it could be repaired within such a time as would have enabled the vessel to prosecute her voyage."

Evidently, therefore, whatever the consequences of the frustration may be upon the conduct of the parties, its legal effect does not depend on their intention or their opinions, or even knowledge, as to the event, which has brought this about, but on its occurrence in such circumstances as show it to be inconsistent with further prosecution of the adventure. Sometimes the event is such as to speak for itself, like the outbreak of war on August 4, 1914, in *Horlock* v. *Beal*: see per Lord Wrenbury. (1) Sometimes the frustration is evident, when the gravity and the circumstances of the breakdown can be known, as in *Bensaude's* case (2); sometimes, as in the case of requisition, when it can be known that in all reasonable probability the delay will be prolonged and a fortiori when it has continued so long as to defeat the adventure. Frustration is then complete. It operates automatically: *Larrinaga & Co.'s* case. (3) What the parties say and do is only evidence, and not necessarily weighty evidence, of the view to be taken of the event by informed and experienced minds.

Language is occasionally used in the cases which seems to show that frustration is assimilated in the speaker's mind to repudiation or rescission of contracts. The analogy is a false one. Rescission (except by mutual consent or by a competent Court) is the right of one party, arising upon conduct by the

(1) [1916] 1 A. C. 486, 528. (2) [1897] A. C. 609.
(3) (1922) 27 Com. Cas. 160.

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other, by which he intimates his intention to abide by the contract no longer. It is a right to treat the contract as at an end if he chooses, and to claim damages for its total breach, but it is a right in his option and does not depend in theory on any implied term providing for its exercise, but is given by the law in vindication of a breach. Frustration, on the other hand, is explained in theory as a condition or term of the contract, implied by the law ab initio, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract: see per Lord Watson in *Dahl* v. *Nelson, Donkin & Co.* (1) It is irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances. It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands.

There is, however, this point of contact between the two cases. Though a party may exercise his right to treat the contract as at an end, as regards obligations de futuro, it remains alive for the purpose of vindicating rights already acquired under it on either side. So with frustration. Though the contract comes to an end on the happening of the event, rights and wrongs, which have already come into existence, remain, and the contract remains too, for the purpose of giving effect to them.

No question of this sort, however, arises here. The contract was wholly executory. The ship was requisitioned before she was placed at the charterers' disposal; the performance of the charter never began, and the failure to begin it by tendering the ship at Singapore was excused in the owners' favour by the excepted restraints of princes. Under these circumstances, by the year 1919, when a dispute first arose, "this charter" no longer existed. The dispute was not one, of which it could be predicated that it was one arising under "this charter," since that had terminated by frustration a year before. An arbitration clause is not a phœnix, that

(1) 6 App. Cas. 38, 59.

can be raised again by one of the parties from the dead ashes of its former self. By its very terms, as well as by the fact that it was only one part of the indivisible charter, it had come to an end also; it is unnecessary to consider in what terms, if any, a clause might have been framed which would have saved the clause alive in the event of the frustration of the adventure and the charter. It may be noted that in practically all the numerous cases of frustration of charters by requisitioning during recent years, the charter must have contained an arbitration clause, yet no point of this kind has apparently been raised on any ordinary form of charter. The cases in general afford little support to the idea that any form of clause would survive the contract as a whole: see *Edward Grey & Co.* v. *Tolme & Bunge* (1) and *In re Hohenzollern Co.* (2), and conversely *Kennedy* v. *Barrow-in-Furness Corporation* in the Court of Appeal, reported in Hudson on Building Contracts. (3)

Sundry special authorities were cited in this connection, but they do not carry matters any further. They are either cases of repudiation and rescission, or of approbation and reprobation, or of continuing obligations under a contract still in being. In the *Johannesburg Municipal Council* v. *D. Stewart & Co.* (4) it was admitted on the pleadings that the contract had been repudiated and the matters in dispute arose out of this, but the Lord Chancellor is reported as saying: "If the course of action which is established be that there has been repudiation or a breaking of the contract in the sense that the contract has been frustrated by the breach, then it would not be within the arbitration clauses." Whatever exactly this sentence means, at any rate it does not help the appellants now. Conversely in *Sanderson & Son* v. *Armour & Co.* (5), though repudiation of the contract by the defenders was pleaded by the pursuers, and the case had of course to be dealt with on the footing that this would be duly proved, it was denied, and the defenders relied on the arbitration clause and were

(1) (1914) 31 Times L. R. 137, 138.
(2) (1886) 54 L. T. 596, 597.
(3) (1909) Vol. ii., 4th ed., 411, 415.
(4) 1909 S. C. (H. L.) 53, 54.
(5) 1922 S. C. (H. L.) 117.

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held entitled to it. A mere allegation that they had thrown the contract up could not deprive them of the right to have the dispute dealt with by the tribunal constituted by it. In *Scott & Sons* v. *Del Sel* (1) Lord Cave L.C. expressly laid aside the question of frustration, since by virtue of its terms the contract continued in existence even in the events which had happened. As for *Jureidini's* case (2), insurers pleaded the absence of an award as to quantum only as a fatal non-fulfilment of a condition to the right to sue on a policy. As they had themselves repudiated the claim in toto, it was held that they could not insist on the absence of an award. It is a case of approbation and reprobation: see *Macaura* v. *Northern Assurance Co.* (3)

Their Lordships' conclusion is that the arbitrator acted without jurisdiction and that the action on his award ought to have failed, and they will humbly advise His Majesty that the two judgments below should be set aside and that judgment in the action should be entered for the appellants, with costs here and below.

Solicitors for appellant: *Gibson & Weldon.*

Solicitors for respondents: *Markby, Stewart & Wadesons.*

(1) 1923 S. C. (H. L.) 37. (2) [1915] A. C. 499.
(3) [1925] A. C. 619, 631.

[PRIVY COUNCIL.]

PETER . . . . . APPELLANT;

AND

YORKSHIRE ESTATE COMPANY, LIMITED, AND ANOTHER . . . . RESPONDENTS.

J. C.*
1926
March 5.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Canada (British Columbia)—Workmen's Compensation—Jurisdiction of Workmen's Compensation Board—Action against Employer not employing Plaintiff—Workmen's Compensation Act (R. S. B. C., 1924, c. 278), s. 12, sub-s. 3.

By s. 12, sub-s. 3, of the Workmen's Compensation Act of British Columbia jurisdiction is given to the Workmen's Compensation Board to determine whether an action brought by a workman against "an employer" is one the right to bring which is taken away by Part I. of the Act:—

Held, on the construction of the Act, that the words "an employer" in the sub-section include any employer within the scope of the Act, whether or not he is the employer of the workman who brings the action.

Judgment of the Court of Appeal affirmed.

APPEAL (No. 96 of 1925) from a judgment of the Court of Appeal of British Columbia (June 4, 1925), reversing an order of Morrison J.

The appellant, a workman, brought an action in the Supreme Court of British Columbia against the respondents to recover damages at common law for personal injuries.

The facts and the material statutory provisions appear from the judgment of the Judicial Committee.

Upon the application of the respondents to the Workmen's Compensation Board it was declared that the appellant's right of action was taken away by Part I. of the Workmen's Compensation Act (R. S. B. C., 1924, c. 278), and the action was stayed.

The respondents thereupon moved the Suprem Court to dismiss the action, but the application was rejected by Morrison J. On appeal to the Court of Appeal

* *Present:* VISCOUNT CAVE L.C., LORD PARMOOR, LORD WRENBURY, LORD BLANESBURGH, and LORD DARLING.

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(Macdonald C.J.A., Martin J.A. and M. A. Macdonald J.A.) the order was reversed and the action for ever stayed.

1925. March 5. *Wilfrid Barton* for the appellant. *Clauson K.C.* and *James Wylie* for the respondents.

The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. It is impossible not to feel sorry for the appellant in this case, but the decision must depend upon the construction of the Workmen's Compensation Act of British Columbia. Their Lordships do not feel any doubt as to the meaning of that Act.

The Act sets up a fund which is maintained by contributions, and which is available for compensating all workmen falling within the Act who suffer injury in the course of their employment. Sect. 4 of the Act applies to employers and workmen in or about certain industries which are there mentioned, including the operation of warehouses and freight and passenger elevators, and "any occupation incidental to or immediately connected with any of the industries enumerated in this section." In a proviso to the same section of the Act it is enacted that "this Part shall not apply to the following: (*a*) persons engaged as travelling salesmen, and not exposed to the hazards incident to the nature of the work carried on in the industry."

Sect. 11, sub-s. 1, provides that: "Where an accident happens to a workman in the course of his employment in such circumstances as entitle him or his dependents to an action against some person other than his employer, the workman or his dependents, if entitled to compensation under this Part, may claim such compensation or may bring such action." That provision is quite general, but an important qualification is introduced into it by sub-s. 4 of the same section, which provides that: "In any case within the provisions of sub-s. 1, neither the workman nor his dependents nor the employer of such workman shall have any right of action in respect of such accident against an employer in any industry within the scope of this Part."

Then provision is made for throwing the cost of the compensation in those cases upon that part of the fund in which the employer really responsible for the injury is interested. Then comes s. 12 of the Act, in which is the important sub-section for present purposes—sub-s. 3. That sub-section provides : " Where an action in respect of an injury is brought against an employer by a workman or a dependent, the Board " (that is to say, the Workmen's Compensation Board) " shall have jurisdiction upon the application of any party to the action to adjudicate and determine whether the action is one the right to bring which is taken away by this Part, and such adjudication and determination shall be final and conclusive : and if the Board determines that the action is one the right to bring which is taken away by this Part the action shall be for ever stayed."

The only other section which need be referred to is s. 74, which gives the Board exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under Part I. of the Act, and provides that the decision of the Board shall be final and not open to review. The section adds " and without restricting the generality of the foregoing the Board shall have exclusive jurisdiction to inquire into, hear and determine," among other questions : " (i) Whether or not any workman in any industry within the scope of this Part is within the scope of this Part and entitled to compensation thereunder " ; and " (j) Whether or not any person, firm or body corporate is an employer within the scope of this Part."

Now the appellant was in the employment of a firm named F. Wilkinson & Co., who dealt in wire rope and other things, and who had a warehouse and an office. The office was situated on the seventh floor of the Pacific Building at Vancouver. The owner of that building was one of the two defendants—it is needless for present purposes to distinguish between them—and one of those defendants operated certain elevators for communication with the upper floors of the building. It was part of the duty of the appellant to report himself from time to time at the office. On June 25,

J. C. 1926 PETER v. YORKSHIRE ESTATE CO.

1924, the appellant attended at the office in the morning. Soon after 11 o'clock he was leaving the office by permission of his employers in order to view the arrival of the special service squadron of the British fleet. He entered one of the elevators, and the elevator most unfortunately fell; he suffered serious injury. The appellant brought an action against the respondents as the owners of the Pacific Building and the persons responsible for operating the elevator, the action being founded upon allegations of defects in the lift and of negligence on the part of the defendants' servants. The defendants applied under s. 12, sub-s. 3, of the Act to the Board to determine whether the action was one the right to bring which was taken away by the Act. The plaintiff, the present appellant, appeared before the Board under protest, and contended, first, that he was not within the Act at all, because he was a travelling salesman and not exposed to the hazards incident to the nature of the work carried on in the industry; secondly, that the defendants were not employers within the meaning of the Act so as to fall within the provisions of s. 12, sub-s. 3; and, thirdly, that in any case s. 12, sub-s. 3, did not on its true construction apply to an action brought by a workman against a person who was not his employer, although he was an employer within the meaning of the Act. The Board decided all those questions against the present appellant. In consequence of that decision the appellant's action has been stayed by the Court of Appeal of British Columbia, and it is against that stay that the present appeal is brought.

The appellant has raised again, as he was entitled to do, the points which have been mentioned. Their Lordships are plainly of opinion that the first two of these points were finally determined by the decision of the Compensation Board. An affidavit has been filed, but it is subject to objection, and their Lordships do not really know exactly on what material the Board came to its decision on the questions of fact; but whatever the materials before the Board may have been, the Board finally decided, as they were entitled to decide, both that the appellant did come

within the scope of the Act, and that the respondents were employers falling within the statute. Those points, therefore, are closed beyond dispute.

There remains the third question, as to the construction of s. 12, sub-s. 3. It is argued on behalf of the appellant that the words " an employer " contained in that sub-section refer only to the employer of the workman there mentioned, and not to a third person, that is to say, to another employer, although that other employer falls within the definition of an " employer " within the meaning of the Act. It might have been an answer to that contention that the Board have jurisdiction to decide questions of law as well as questions of fact; but it appeared to their Lordships more satisfactory to come to a conclusion themselves upon the point of law, and they are of opinion that the contention cannot prevail. Throughout ss. 11 and 12 of the Act a distinction is drawn between " the employer " of a workman, who is from time to time referred to, and " an employer " within the meaning of the Act. It has been pointed out that in three expressions contained in the two sections " the employer " of the workman is clearly pointed to, and that in three other instances the word " employer " is used with reference to any employer under the Act. The seventh instance which occurs in the Act is the one in s. 12, sub-s. 3, which has to be dealt with. Upon the whole their Lordships are of opinion that the words " an employer " there occurring include any employer who falls within the purview of the Act. That view is supported by the circumstance that the Board is by the same sub-section authorized to determine whether an action is one the right to bring which is taken away " by this Part," that is to say, by any section of this Part of the Act, including s. 11, sub-s. 4. That is the view which was taken by the Court of Appeal of British Columbia, and their Lordships do not see their way to differ from the conclusion of the Court. It follows that this appeal must be dismissed with costs, and their Lordships will humbly advise His Majesty to that effect.

Solicitors for appellant: *Charles Russell & Co.*
Solicitors for respondents: *Linklaters & Paines.*

[PRIVY COUNCIL.]

J. C.* 1926 April 15.

SOBHUZA II. . . . . Appellant;

AND

MILLER AND OTHERS . . . . . Respondents.

ON APPEAL FROM THE SPECIAL COURT OF SWAZILAND.

Constitutional Law—Protectorate—Swaziland—Administrative Power—Order in Council—Act of State—Foreign Jurisdiction Act, 1890 (53 & 54 *Vict. c.* 37).

An extension of British jurisdiction in a British protectorate by Orders in Council may be referred to an exercise of power by an act of State, unchallengeable in any British Court, or to statutory powers given by the Foreign Jurisdiction Act, 1890, under which the jurisdiction acquired by the Crown in a protected country is indistinguishable in legal effect from that acquired by conquest. The Crown cannot, except by statute, deprive itself of freedom to make Orders in Council, even such as are inconsistent with previous Orders.

Before the conquest and annexation of the South African Republic Swaziland was an independent native State, treated as a protected dependency of that Republic, by which it was administered under a Convention made in 1894 between Great Britain and the Republic. The Convention provided for the preservation of native law, and the agricultural and grazing rights of the natives. The annexation did not extend to Swaziland. Subsequently under Orders in Council certain lands in Swaziland were expropriated to the Crown, to the extinguishment of the use and occupation of them by natives under native law, certain lands being allotted exclusively to the natives:—

Held, that the Orders in Council were effective, even if they were not within the powers recognized by the Convention.

Rex v. *Earl of Crewe* [1910] 2 K. B. 576 approved.

Judgment of the Special Court of Swaziland affirmed.

Appeal (No. 158 of 1924) from a judgment of the Special Court of Swaziland (May 27, 1924).

The appellant, who was paramount chief of Swaziland, presented a petition to the Special Court of Swaziland, on behalf of himself and the chiefs and natives of Swaziland; he claimed an order ejecting the respondents from certain land in that country, a declaration of rights, and an injunction.

* *Present:* Viscount Cave L.C., Viscount Haldane, Lord Parmoor, Lord Phillimore, and Lord Blanesburgh.

The petition called in question the validity of certain Orders in Council, and proclamations and grants of land made thereunder.

The facts are fully stated in the judgment of the Judicial Committee.

The Special Court dismissed the petition.

1926. March 2, 4, 8. *Horace Douglas* for the appellant. Swaziland does not form part of the British dominions, and the Crown had no rights to dispossess the natives of their lands, or of their rights of user or occupation. The country was merely a species of protectorate ; it was not a protectorate of the kind known in international law. The only rights which the Crown possessed were such as were acquired upon the conquest of the South African Republic. Those rights were subject to the condition contained in art. 2 of the Convention between Great Britain and the Republic ; the effect of that article was to guarantee to the natives their use and occupation of the land under native law. The Foreign Jurisdiction Act, 1890, is not applicable. Further, the Orders in Council did not divest the natives of their rights in respect of the land in dispute. [Reference was made to *Johnston* v. *M'Intosh* (1) ; *St. Catherine's Milling Co.* v. *The Queen* (2) ; *Attorney-General* v. *De Keyser's Royal Hotel* (3) ; and *Amodu Tijani* v. *Secretary, Southern Nigeria.* (4)]

Sir Douglas Hogg A.-G. and *Giveen* for the respondents. Swaziland was a foreign country, in which there was jurisdiction under the Foreign Jurisdiction Act, 1890, and the Orders in Council had statutory effect under that Act. [Reference was made to Jenkyn's British Rule and Jurisdiction beyond the Seas (1902), pp. 179, 181, 182 ; Hall's Foreign Jurisdiction of the British Crown, p. 225 ; Westlake's Collected Papers on International Law, p. 190 ; *Rex* v. *Earl of Crewe* (5) ; and *In re Southern Rhodesia.* (6)] Even if the above Act was not applicable, the Orders in Council were acts of State, and not questionable by the Court. There may be an

(1) (1823) 8 Wheaton, U. S. 543.
(2) (1888) 14 App. Cas. 46.
(3) [1920] A. C. 508, 562.
(4) [1921] 2 A. C. 399, 407.
(5) [1910] 2 K. B. 576.
(6) [1919] A. C. 211, 233, 234.

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annexation of jurisdiction without any annexation of territory. The proclamation and the grant were within the Orders, and, not being repugnant to any statute, were valid and effective.

Horace Douglas in reply. Jurisdiction in Swaziland was not acquired in any of the manners referred to in the preamble to the Foreign Jurisdiction Act, 1890, and that Act does not apply. If that is so the Orders in Council were ineffective in the absence of ratification by Parliament: *Forester* v. *Secretary of State for India.* (1)

April 15. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Special Court of Swaziland, by which a petition of the appellant has been dismissed with costs. The petition was presented against the first respondent, and the second respondents were added at the trial on the footing that they claimed to own the land in controversy and that the first respondent was acting as their manager. The substance of the petition was that certain lands, known as Farm 188, formed part of an area originally subject to a concession known as the "Unallotted Lands Concession," granted by the former King of the Swazis, Umbandine, on July 26, 1889. Under this concession the grantees bound themselves to respect all prior rights, and, further, in no way to interfere with the rights of the native subjects of the grantor. The concession of 1889 was expressed to have been made by the King with the advice and consent of his Indunas in Council in favour of two persons, Thorburn and Watkins, of exclusive grazing, and to have conferred agricultural and planting rights over the unoccupied land within the concession, for fifty years, with a right to renewal, at a yearly rent of 50*l.* The King, in consideration of this, undertook to protect the concessionnaires in the exercise of their rights. The claim made in the petition was that the first respondent had trespassed on the existing rights of native occupiers and had caused them to be ejected from the land they occupied.

(1) (1872) L. R. I. A. Supp. 10.

Evidence was taken at the trial of the petition. It was found that certain natives and their predecessors had been for a long time in occupation of portions of the land included within the concession, and that they were now being ejected from the portions of the land other than such as had been demarcated for the sole and exclusive use of the natives. The judgment of the Court set out that the original concession had been confirmed on December 17, 1890, by the High Court of Swaziland, a Court constituted by the King of the Swazis with the assent of the British Government and the South African Republic, and having jurisdiction to inquire into the validity of concessions such as that in question. But on September 19, 1908, the concession was expropriated by the High Commissioner by notice to the concessionnaires under art. 12 of Proclamation No. 3 (Swaziland), 1904. The judgment went on to state that by Order in Council of November 2, 1907, the area of the concession became Crown land, as having been expropriated, and that a portion of it was granted to the respondent company, who claimed a clear freehold title under the grant. The natives, on the other hand, claimed that their rights of use and occupation under native law had not been affected. It was contended for them that the rights they possessed before and after the granting of the concession remained intact, and had been recognized later on by art. 5 of the Order in Council made on June 25, 1903, and that these rights had not been subsequently cut down. The Court held that, at all events by the Order in Council made on November 2, 1907, the ownership of the land had passed to the Crown, and that the effect of this was to extinguish any rights of use and occupation that were in the natives ; and that the documents and circumstances showed that it was intended to extinguish all such rights. As matter of fact, the natives were given instead sole and exclusive rights over one-third of the land included in the concession, and the concessionnaires had been given such rights over the remaining two-thirds. In the opinion of the Court below, the Order in Council of November 2, 1907, was validly made. Even if Swaziland

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was no more than a protectorate, it was one which approximated in constitutional status to a Crown Colony, and the Crown had power to make laws for the peace, order and good government of Swaziland, and of all persons therein. Any original native title had, therefore, been effectually extinguished.

The question which their Lordships have to consider is whether this conclusion was right in point of law. Into any topic of policy they are, of course, precluded from entering. In order to come to a conclusion on the legal question it is necessary to look at the history and circumstances in which it has arisen.

Swaziland lies on the east of the Transvaal, between that country and the coast. It was treated as an independent native state both by the South African Republic and by the British Government, notwithstanding a good deal of interference by both in its affairs, and it was recognized, and still is recognized, as a protectorate. But the South African Republic appears, from the terms of the Convention made in 1894, to have become preponderant in the internal control. The relationship seems to have been recognized as being one in which Swaziland stood to the Republic as a protected dependency administered by the South African Republic. This protectorate stopped short of incorporation, but apparently it was recognized by the Convention of 1894 between Great Britain and the South African Republic (art. 2) as giving the latter, without incorporation, all rights of protection, legislation, jurisdiction and administration over Swaziland, and the inhabitants thereof. The natives were, however, guaranteed in their laws and customs, so far as not inconsistent with laws made pursuant to the Convention, and in their grazing and agricultural rights, with the proviso that no law thereafter made in Swaziland was to be in conflict with the guarantees given to the Swazi people in the Convention.

The question which at once presents itself is, what is the meaning of a protectorate? In the general case of a British Protectorate, although the protected country is not a British

dominion, its foreign relations are under the exclusive control of the Crown, so that its Government cannot hold direct communication with any other foreign power, nor a foreign power with its Government. This is the substance of the definition given by Sir Henry Jenkyns at p. 165 of his book on British Rule and Jurisdiction beyond the Seas. Their Lordships think that it is accurate, and that it carries with it certain consequences. The protected state becomes only semi-sovereign, for the protector may have to interfere, at least to a limited extent, with its administration in order to fulfil the obligations which international law imposes on him to protect within it the subjects of foreign powers. A restricted form of extra-territorial sovereignty may have its exercise called for, really involving division of sovereignty in the hands of protector and protected. But beyond this, it may happen that the protecting power thinks itself called on to interfere to an extent which may render it difficult to draw the line between a protectorate and a possession. In South Africa the extension of British jurisdiction by Order in Council has at times been carried very far. Such extension may be referred to an exercise of power by an act of State, unchallengeable in any British Court, or it may be attributed to statutory powers given by the Foreign Jurisdiction Act, 1890. This statute provided, upon the preamble that by treaty, capitulation, grant, usage, sufferance, and other lawful means, the Crown has power and jurisdiction in divers countries and places outside its dominions, and that it was expedient that Acts relating to the exercise of such jurisdiction should be consolidated, that it should be lawful for the Sovereign to hold, exercise and enjoy any jurisdiction now or hereafter possessed within a foreign country in the same and as ample a manner as if the jurisdiction had been acquired by cession or conquest of territory, and that every act and thing done in pursuance of any such jurisdiction was to be as valid as if it had been done according to the local law then in force in that country. It was provided that any Order in Council made in pursuance of the Act should be laid before both Houses of Parliament within a limited time, and should

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have effect as if enacted in the Act. The Foreign Jurisdiction Act thus appears to make the jurisdiction, acquired by the Crown in a protected country, indistinguishable in legal effect from what might be acquired by conquest. It is a statute that appears to be concerned with definitions and secondary consequences rather than with new principles. This view of it was also that taken in an important judgment of the Court of Appeal: *Rex* v. *Earl of Crewe.* (1) There, by an Order in Council, the High Commissioner for South Africa had been authorized to provide in the Bechuanaland Protectorate for the administration of justice and for the peace, order and good government of all persons within that protectorate and the prohibition and punishment of all acts tending to disturb the public peace. Sekgome, the chief of a native tribe, was detained in custody under a proclamation purporting to have been made by the High Commissioner under the powers so conferred. He applied for a habeas corpus against the Secretary of State for the Colonies. It was held that the protectorate was a foreign country within the meaning of the Foreign Jurisdiction Act, and that the proclamation was validly made.

It was further held that the detention was lawful, inasmuch as the construction of the Act settled by practice rendered it impossible to limit its application to British subjects in the foreign country. Vaughan Williams L.J. considered that the proclamation under which the detention took place was valid as a law which the Act gave the Crown absolute power to make and apply, just as if the territory had been obtained by cession or conquest. He also held that the detention could be independently justified as an act of State. Kennedy L.J. concurred, definitely on the view that the detention could be justified as an act of State, as well as under the Foreign Jurisdiction Act. The stress in the judgment of Farwell L.J., who arrived at the same conclusion as to the validity of the proclamation under which the detention was made, was laid on the construction of that Act, which he interpreted in a similarly wide sense.

(1) [1910] 2 K. B. 576.

In the *Southern Rhodesia* case (1) Lord Sumner, in an elaborate judgment given on behalf of the Judicial Committee on a special reference, expressed views which are substantially similar. He held that a manifestation by Orders in Council of the intention of the Crown to exercise full dominion over lands which are unallotted is sufficient for the establishment of complete power. Both of these cases imply that what is done may be unchallengeable on the footing that the Order in Council, or the proclamation made under it, is an act of State. This method of peacefully extending British dominion may well be as little generally understood as it is, where it can operate, in law unquestionable.

Such being the principle, it remains to ascertain whether it has been put in operation in the case under consideration. To answer this question it is first necessary to recall the true character of the native title to land throughout the Empire, including South and West Africa. With local variations, the principle is a uniform one. It was stated by this Board in the Nigerian case of *Amodu Tijani* v. *Secretary, Southern Nigeria* (2), and is explained in the report made by Rayner C.J. on Land Tenure in West Africa, quoted in the case referred to. (3) The notion of individual ownership is foreign to native ideas. Land belongs to the community and not to the individual. The title of the native community generally takes the form of a usufructuary right, a mere qualification of a burden on the radical or final title of whoever is sovereign. Obviously such a usufructuary right, however difficult to get rid of by ordinary methods of conveyancing, may be extinguished by the action of a paramount power which assumes possession or the entire control of the land.

Turning next to the history of what was done in Swaziland by the British Government, the material events may be stated briefly.

Swaziland was originally under the rule of native kings, and concessions conferring rights in respect of land were granted by them to persons other than natives. The land in

(1) [1919] A. C. 211. (2) [1921] 2 A. C. 399.
(3) Ibid. 404.

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question was granted, by the concession known as the "Unallotted Lands Concession" of July 26, 1889, to Thorburn and Watkins, as already stated. The grant was made by King Umbandine, who reigned between 1875 and 1889. The grant, which was of farming and planting rights for fifty years, with a provision for renewal, at an annual rent of 50*l*., bound the grantees in no way to interfere with the rights of the King's native subjects. There was conferred power to sublet or transfer.

In September, 1890, Ungwane, the then King of the Swazis, set up by organic proclamation a Chief Court composed of three judicial members approved by the British High Commissioner and the President of the South African Republic, such Court to have full jurisdiction over all persons in Swaziland of European extraction, and over all questions, matters and things in which such persons were concerned. The Court was to undertake judicial inquiry into the validity of disputed concessions. In 1890 it confirmed the concession in question. By deed of cession the grantees transferred the area comprised in it, including the territory in dispute, but excepting certain distinct areas which had previously been transferred to others, to the second respondents. Ungwane was succeeded by his son, Sobhuza, the appellant, who is the present king or paramount chief.

When the Boer war broke out in 1899 Swaziland had for some years come to be under the protectorate of the South African Republic. This was the result of the Convention of 1894 between the Republic and the British Government. After the conquest and annexation of that Republic, by Order in Council of June 25, 1903, the Crown, on the recital that by the conquest and annexation all rights and powers of the South African Republic had passed to the British Sovereign, ordered that the Governor administering the Transvaal might exercise all powers and jurisdictions of the Crown and take all such measures and do all such things as were lawful and in the interest of His Majesty's service, as he might think, subject to instructions, expedient. The Governor was expressly empowered by proclamation to provide for the

administration of justice, the raising of revenue, and generally for the peace, order and good government of Swaziland, and of all persons therein, including the prohibition and punishment of acts tending to disturb the public peace. He was, in issuing such proclamations, to respect any native laws by which the civil relations of any native chiefs, tribes or populations under His Majesty's protection were regulated, except so far as the same might be incompatible with the due exercise of His Majesty's power and jurisdiction or clearly injurious to the welfare of the natives. Such proclamations were to be published, and might be disallowed or modified by the Sovereign.

By Order in Council of December 1, 1906, the powers given to the Governor administering the Transvaal were transferred to the High Commissioner for South Africa.

By a subsequent Order in Council of November 2, 1907, on the recital that it was intended that portions of certain lands in Swaziland the subject of concessions or grants made by paramount chiefs and confirmed by the Chief Court under the organic proclamation of 1890, should be set apart and demarcated for the exclusive use and occupation of natives, and that the remaining portions should be granted or leased to European persons claiming rights under such concessions or should be held by the High Commissioner for South Africa, His Majesty, by virtue of the powers vested in His Majesty under the Foreign Jurisdiction Act or otherwise, ordered that all rights in any land in the said territory not being land set apart and demarcated by the authority of the High Commissioner for the sole and exclusive occupation of the natives, and proclaimed as Crown lands, and also in any land within the territory lawfully transferred to or expropriated by the High Commissioner in exercise of the powers vested in him by proclamation or otherwise for the peace, order, and good government of the territory, should vest in and be exercised by the High Commissioner, who might make grants or leases of such lands.

By proclamation of the High Commissioner made on March 16, 1917, certain areas were proclaimed as Crown

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lands, and among these areas was a portion of the lands included in the Unallotted Lands Concession of 1889. This had been in 1908 expropriated by notice given by the High Commissioner under the powers vested in the Governor of the Transvaal by the Order in Council of June 25, 1903, the exercise of which he had provided for by Swaziland Proclamation No. 3 of 1904. Under a Crown grant of March 16, 1917, the High Commissioner granted to the second respondents a part of the land subject to the concession and now in dispute, as compensation for lands which they had relinquished in his favour. By proclamation promulgated on the same date the High Commissioner had proclaimed to be Crown land the portion of the unallotted land included in the original Unallotted Lands Concession, and this portion included the land granted as compensation to the second respondents and now in dispute.

The principles of constitutional law laid down in the earlier part of their Lordships' judgment render it in their opinion impossible to maintain the argument submitted for the appellant. That argument is that the Crown has no powers over Swaziland, except those which it had under the conventions and those which it acquired by the conquest of the South African Republic. The limitation in the Convention of 1894 on interference with the rights and laws and customs of the natives cannot legally interfere with a subsequent exercise of the sovereign powers of the Crown, or invalidate subsequent Orders in Council. But if this be true it makes an end of the appellant's case. For the Order in Council of 1907, after providing for power to set apart certain lands in Swaziland, the subject of concessions by the paramount chiefs, enabled the High Commissioner to acquire the remaining land and to deal with it. He had therefore full power to make the Crown Grant of March 16, 1917. The power of the Crown to enable him to do so was exercised either under the Foreign Jurisdiction Act, or as an act of State which cannot be questioned in a Court of law. The Crown could not, excepting by statute, deprive itself of freedom to make

Orders in Council, even when these were inconsistent with previous Orders.

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Their Lordships will humbly advise His Majesty that this appeal should be dismissed. As the question involved is concerned with constitutional issues and is of far-reaching public interest, they will advise, following precedents in other cases, that there should be no costs of the appeal.

Solicitor for appellant: *E. F. Hunt.*
Solicitor for respondents: *Treasury Solicitor.*

[PRIVY COUNCIL.]

KHOO HOOI LEONG . . . . . APPELLANT;

AND

KHOO HEAN KWEE . . . . . RESPONDENT.

J. C.* 1926 *March* 23.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS (PENANG).

Straits Settlements—Marriage Law—Chinese Resident—Children by secondary Wife—Gift to Sons and Grandsons—Extrinsic Evidence—Christian T'sip—Legitimacy.

The children of a Chinese resident in the Straits Settlements by a "t'sip," or secondary wife, are regarded as legitimate and entitled to inherit equally with his children by his "t'sai," or primary wife; no form of marriage ceremony is necessary to create the position of "t'sip."

Cheang Thye Phin v. *Tan Ah Loy* [1920] A. C. 369, approving the *Six Widows* case (1908) 12 Straits Settlements L. R. 120, followed.

A Chinese resident in Penang executed a deed settling a fund upon his "sons and grandsons" equally. The appellant claimed that his father, T., was a "son" of the settlor entitled to share in the gift:—

Held, that if T. was not a legitimate son, even in the extended sense above indicated, evidence that the settlor treated him as legitimate, or called him legitimate, was not admissible to introduce him into the class of "sons and grandsons."

An inquiry whether T. was legitimate, as being a son by a "t'sip," was remitted for rehearing, the appellant not having had an opportunity of adducing certain evidence upon which he relied, and because the view

* *Present:* VISCOUNT HALDANE, LORD WRENBURY, and LORD PHILLIMORE.

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of the Supreme Court that a Christian woman could not be a "t'sip" required reconsideration, seeing that no ceremony was needed to constitute that status. Further consideration was also needed of the possible jural conceptions: (*a*) that a child might be legitimate, although its parents were not, and could not be, legitimately married; and (*b*) that a father might legitimatize his natural child by a mother free to contract a legitimate union.

One judgment of the Supreme Court affirmed and one reversed.

APPEALS (No. 2 and No. 123 of 1925), No. 2 from a judgment of the Court of Appeal of the Straits Settlements, Penang (April 28, 1924), varying a judgment of Sproule J. (November 16, 1923); No. 123 from an order of the above Court of Appeal affirming an order of Whitney J. (November 4, 1924).

The appeals, which were heard together, arose out of an originating summons issued in the Supreme Court in the matter of two deeds of settlement of December 8, 1888, made by Khoo Thean Tek, a Chinese resident in Penang, deceased.

Upon the said summons the present appellant contended that his father, Khoo Hun Tee, a son of the settlor, was within the class of "sons and grandsons" who were beneficiaries under one of the deeds, whether he was a legitimate son or not. The trial judge (Sproule J.) accepted that view, but it was rejected by the judgment of the Court of Appeal dated April 28, 1924. Appeal No. 2 of 1925 was from the latter decision.

Sproule J. by his judgment had directed (among other inquiries) an inquiry whether Khoo Hun Tee was a legitimate son of the settlor. On June 6, 1924, the registrar certified that Khoo Hun Tee was not legitimate. The present appellant moved to vary the certificate in that respect. Whitney J. made an order dismissing the motion; that order was affirmed upon appeal to the Court of Appeal. Appeal No. 123 of 1925 was from that decision.

The material facts appear from the judgment of the Judicial Committee.

1926. Feb. 18, 19, 22. *De Gruyther K.C.* and *Whinney* for the appellant. A son of a Chinese resident in the Straits

Settlement by a t'sip has the same right of succession as a son by a t'sai: *Six Widows* case (1); *Cheang Thye Phin* v. *Tan Ah Loy*. (2) But even if Khoo Hun Tee was not a son by a t'sip, the intention of the settlor was to include him among the "sons and grandsons" who were beneficiaries under the deed. That appears from the language of the will made shortly after the deed, and from the fact that the settlor frequently referred to Tee as a "son." The will and the above fact are admissible as furnishing a "dictionary" by which to interpret the words used by the settlor in the deed: *In re Jodrell* (3); *Loveland* v. *Loveland* (4); Jarman on Wills, 6th ed., p. 1759. The certificate made upon the inquiry as to Tee's legitimacy should be discharged or varied. Tee was given no proper opportunity to put his evidence before the registrar. There is no authority to support the view that a Christian woman cannot be a t'sip, nor was it shown that Tee's mother was a Christian at the date of the appellant's procreation. [On the question of legitimacy reference was also made to *Campbell* v. *Campbell*. (5)]

Gavin Simonds K.C. and *Whinney* for the respondent. Admitting that the words "sons and grandsons" had a wider meaning than they would have in England, and that the circumstances in which they were used in the deed are to be considered, it is clear on the authorities that the intention of the testator cannot be ascertained in the manner proposed. The words "sons and grandsons" must be given their natural meaning, and if Tee was not a son by a t'sip, the words do not include him: *Hill* v. *Crook* (6); *Dorin* v. *Dorin* (7); *In re Fish* (8); *In re Pearce*. (9) In any case the evidence referred to does not establish that the intention of the settlor was to include Tee among the beneficiaries. The certificate of the registrar had become binding upon the appellant under the Code of Civil Procedure long before the application to vary it was made. Under s. 1004 of the

(1) 12 Straits Settlements L. R. 120.
(2) [1920] A. C. 369.
(3) (1890) 44 Ch. D. 590, 605.
(4) [1906] 1 Ch. 542, 547.
(5) (1867) L. R. 1 Sc. App. 182.
(6) (1873) L. R. 6 H. L. 265.
(7) (1875) L. R. 7 H. L. 560.
(8) [1894] 2 Ch. 83.
(9) [1914] 1 Ch. 254.

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Code the Court had no doubt a discretion to vary the certificate in special circumstances; but the facts were before the Court, and the Board will not interfere with the exercise of its discretion. It was not shown that the appellant could have produced evidence which would have resulted in a decision different from that arrived at.

De Gruyther K.C. replied.

March 23. The judgment of their Lordships was delivered by

LORD PHILLIMORE. These two appeals are from orders made in the course of the administration of the trusts of a settlement of real estate made by Khoo Thean Tek, a wealthy inhabitant of Chinese race, living in Penang.

The settlor executed three settlements of immovable property, all dated December 8, 1888, all of them creating a life estate in himself and then disposing of the property after his death, and he made a will on the following April 29, devising such of his real estate as was not already settled, and bequeathing his personal estate.

One of the settlements was held to be wholly void as providing for superstitious uses or perpetuities not charitable, and in the second settlement, called the Boon Eow Tong, one clause was held invalid for similar reasons. This latter settlement is only important as illustrating some points in connection with the settlor's family and his mode of describing his various descendants.

The principal question raised concerning the construction of the third settlement was the number of shares into which the property, after the expiry of various life interests, was to be divided.

The settlor died on April 8, 1890, and the summons in this case was taken out on October 5, 1923.

The settlor had a son by his first wife, named Kang, who predeceased him without male issue, but leaving two adopted sons, Tean and Tuan. After that wife's death he married again, and by his second wife he had two sons, one of them named Yeam, sometimes spelt "Eam," who survived him, and another son, Chin, who predeceased him, also dying

without male issue, but having adopted a son, Kwee, who at the date of the administration summons was trustee of the real estate settlement. He took out the summons, and made the leading affidavit giving the general facts of the case.

The settlor had in addition to his principal wife two or more secondary wives or concubines, by one of whom he had a son, Yang or Yeang, and by the other a son, Eng. Whether he had a third concubine in a similar position, and whether by that concubine he had a son who was the appellant's father, and what title such a son would have to share in the proceeds of the settled real estate, are the questions now to be considered.

The position of a concubine or mistress—this latter phrase is used by the settlor—or secondary wife under Chinese law and custom is peculiar, and a little difficult for a Christian and western mind to grasp. It is said that for a long time such a union was considered as carrying with it no legal consequences, and that the children were deemed frankly illegitimate throughout the Straits Settlements. But in the *Six Widows* case (1) the Supreme Court of the Straits Settlements decided in the year 1888 that a " t'sip " or secondary wife is entitled to take a widow's share in the estate of her deceased husband, she being equivalent for this purpose with a " t'sai " or principal wife ; and following this doctrine to its logical conclusion, the same Court held that the children of a " t'sip " were entitled to inherit equally with the children of a " t'sai." In a later case the same Court decided that no form of marriage ceremony was necessary for creating the position of a " t'sip," and an appeal having been taken to His Majesty in Council, this Board advised that the judgment should be affirmed, thereby also inferentially affirming the previous judgment. This case is reported as *Cheang Thye Phin* v. *Tan Ah Loy*. (2)

When this administration summons came to be heard, advocates appeared for the trustee and for the various parties

(1) 12 Straits Settlements L. R. 120.

(2) [1920] A. C. 369.

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interested with one exception, that of the present appellant, who was the son of one, Tee. Now Tee was a son of the settlor, and though not mentioned by name in the deed was described by him in his will as "begotten of a Christian woman." The judge before whom the case was heard, Sproule J., decided that the appellant ought to be represented, and there and then made an order that a Mr. de Buriatte—a professional man holding a position in the firm of Presgrave & Matthews, who were solicitors for the trustee, though not actually having the rank of a partner—should represent the appellant. It was not altogether a fortunate choice, as will appear when the second appeal has to be considered.

However, on this occasion Mr. de Buriatte had only the task of arguing upon the construction of the deed and the possibility of introducing the will as throwing light upon the deed, and he performed his task with such success as to obtain judgment from Sproule J. in his client's favour declaring him entitled to one-sixth of the proceeds of the real estate.

Sproule J. importing into the construction of the deed the language of the will decided that the appellant's father took a share as a son of the settlor, whether legitimate or not. He further directed an inquiry as to his legitimacy.

From the order of Sproule J. in so far as it decided that the appellant's father was entitled to be considered as a son whether legitimate or not, appeal was taken to the Supreme Court, which reversed this part of Sproule J.'s decision, and decided that the property should not be divided into six shares unless the appellant's father was a legitimate son. Otherwise it was to be divisible into five, and Tee, the appellant's father, was to be deemed excluded.

It is from this order that the first appeal is brought.

By the terms of the settlement the property was conveyed to trustees: "Upon trust to hold the same during the joint lives of Khoo Hun Yeang, Khoo Hun Eam, Khoo Hun Eng, Khoo Ngay Tuan, Khoo Ngay Tean, and Khoo Heng Quee now living and the life of the survivor of them and a term of twenty-one years from the death of the survivor and during such period as hereinafter mentioned to manage and let the

same . . . . And upon trust in the first place to pay such rents and annual income to me the said Khoo Thean Tek during my life and after my decease upon trust thereout in the first place to defray the expenses of such management . . . . And then upon trust to pay and discharge the several bequests legacies and allowances made by my last will and testament (in case my personal estate shall prove insufficient for the purpose). And upon trust for the period of twenty-one years from my decease to accumulate and invest the surplus income . . . . with the trustees for the time being of the Boon San Tong Kongsee upon the promissory note of the said trustees of such Kongsee. . . . . And upon trust as to the income of my said trust property on the expiration of the said period of twenty-one years and until the final vesting of my trust estate itself (as part from the income) in the beneficiaries hereinafter provided for to pay the income of such property and accumulations which shall remain after providing for the expenditure hereinbefore referred to equally yearly between my sons and grandsons including in such designation the adopted sons of my sons Khoo Hung Kang and Khoo Heng Chin, namely, Khoo Ngay Tuan, Khoo Ngay Tean and Khoo Heng Quee such division to be made per stirps (according to the number of my sons) and not per capita and upon further trust with regard to the corpus of the said trust estate the houses and premises aforesaid and the accumulations thereof and the investments of such accumulations at the expiration of the period of twenty-one years hereinbefore created after the decease of the survivor of them the said Khoo Hun Yean, Khoo Hun Eam, Khoo Hun Eng, Khoo Ngay Tuan, Khoo Ngay Tean, and Khoo Heng Quee to sell and dispose of my said houses buildings and plantations in such manner as in their discretion they shall deem best . . . . and to get in such accumulations and investments and to divide the proceeds of such realisation and calling in hereinafter called my trust fund amongst my sons and grandsons including among them the adopted children of my sons Khoo Hung Kang and Khoo Heng Chin now deceased named respectively : Khoo Ngay Tuan,

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Khoo Ngay Tean and Khoo Heng Quee equally and so that my sons and grandsons aforesaid shall take per stirps and not per capita being one share apiece to each of my sons . . . . And I direct that if either of my said trustees shall die or be desirous of being discharged or become incapable to act in the trust of these presents it shall be lawful for the said trustees or if only one then for such one trustee to appoint any person or persons from amongst my sons namely Khoo Hung Yeang, Khoo Hun Eam and Khoo Hun Eng and grandsons namely Khoo Ngay Tuan, Khoo Ngay Tean, and Khoo Heng Quee to be a trustee or trustees. . . . ."

In the Boon Eow Tong settlement the persons mentioned are " my sons, namely, Yang, Yean and Eng, and my grandsons, namely, Tuan, Tean and Kwee," Yang and Eng being his children by concubines, and the so-called grandsons being the adopted sons of sons.

In neither of these documents is there any mention of the appellant's father Tee, but in the will his name occurs. In the eighth clause direction is given for the sale of the testator's sugar-cane and coco-nut plantations and other landed property, excepting the tin mines. And the proceeds are to be applied as follows : " Firstly to pay the income and interest of a sum of $20,000 to my wife, Ooee Keok Neoh, for the use and education of my adopted son, Khoo Hung Boh, during his minority and after the expiration of which period, to pay the said sum of $20,000 to him absolutely. Secondly to pay the income or interest of $20,000 to Khoo Hun Tee (a son begotten by a Christian woman) for the use and education of his son named Khoo Hooi Leong during his minority, and on the completion of which period to pay the said sum of $20,000 to the said Khoo Hooi Leong absolutely, subject expressly to my wish that he the said Khoo Hooi Leong be brought up in my own religion and upon attaining his majority shall himself declare that he adopts the same and, if otherwise, he shall not be entitled to receive such legacy, and in which event such legacy shall lapse into my residuary estate. Thirdly, to pay the income or interest of the rest and residue of the funds and moneys realised from my said mercantile

firms and from the said sugar-cane and coco-nut plantations, and the lands and houses in Native States aforesaid unto eighteen shares, namely, four shares to my son Khoo Hun Yeang, four shares to my son Khoo Hun Eam, four shares to my son Khoo Hun Eng, two shares to my grandson Khoo Ngay Tuan, two shares to my grandson Khoo Ngay Tean and two shares to my grandson Khoo Heng Quee."

The twentieth clause, relating to the settlor's tin mines, contains this paragraph: "In the event of a sale being effected of the said property I will and direct further that the proceeds thereof shall be divided and apportioned into eighteen equal shares between my sons and grandsons, namely, my son Khoo Hun Tee (begotten by a Christian woman), six shares, Khoo Hun Yang two shares, Khoo Hun Eam two shares, Khoo Hun Eng two shares, Khoo Ngay Tuan two shares, Khoo Ngay Tean two shares, and Khoo Heng Quee two shares. And I declare that the money so realised shall not be paid to the above-named beneficiaries or their respective heirs till the expiration of twenty-one years after my death."

By the twenty-first clause the trustees are: "To divide and apportion the rest of such residuary estate on my son Khoo Hun Eng attaining his majority between my sons and grandsons, namely, Khoo Hun Yeang, Khoo Hun Eam, Khoo Hun Eng, Khoo Ngay Tuan, Khoo Ngay Tean and Khoo Heng Quee in six equal shares, and in the meantime to invest the same in manner hereinbefore provided."

All the parties to the proceedings except the present appellant asserted that Tee's mother had not the rank of a concubine, and that Tee was not legitimate in the sense in which children in the *Six Widows* case (1) were declared to be legitimate, and that consequently Tee was not included in the expression "my sons and grandsons" used by the settlor to designate the objects of his bounty.

On the other hand it occurred to Sproule J. that in the will Tee was described as a son, though with the curious qualification occurring twice over "begotten by a Christian woman"; and as a result of the argument he held that he

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could consider the will which referred to the previous deeds and the three deeds as all constituting one transaction by which the settlor dispersed of his property after his death, and that the will showed that Tek (to use a phrase which has been adopted in several of the decided cases) " had made his own dictionary," and when he used the word " son " meant to include any natural son, legitimate or illegitimate ; and he decided as already stated.

The answer to this argument is that the will, dated three months or more after the deed, cannot be used as a dictionary for the deed ; that there is no ambiguity in the deed ; that when the settlor intended to treat adopted grandsons as grandsons or the sons of concubines as sons, he has always added their names—the language of the clauses running " my sons and grandsons including . . . ." Then follow the names. Or, " amongst my sons, namely," so and so " and grandsons namely," so and so.

Their Lordships think that the view of the Court of Appeal was right, and that the will could not be used to construe the deed.

But then it is said that if the will be put aside still it would be possible for the appellant to use the dictionary argument by showing that the settlor constantly referred to Tee as his son, and that if the appellant had been properly served with a summons and had had the opportunity of instructing his own advocate he might have been able to bring materials before the Court which would have shown that when the settlor used the word " son " he must have meant to include the appellant's father.

The possible prejudice to the appellant owing to his not having the chance of properly instructing counsel will be dealt with when the second appeal comes under consideration. But for the reasons which are about to be given it does not enter into this stage of the case.

It is right in construing such a document as a settlement or a will that the Court should put itself into the position of the settlor or the testator and construe his language according to his knowledge. But this does not mean that the Court

is to look anywhere for the intentions of a settlor except to the terms of the document itself. In these matters the caution administered by Kay L.J. in the case of *In re Fish* (1) must always be borne in mind, and the Court must be on its guard against letting in extrinsic evidence of what the settlor intended under the guise of evidence as to the circumstances existing when he made the settlement.

Among the number of cases which deal with this question the most striking authorities are *Hill* v. *Crook* (2); *Dorin* v. *Dorin* (3); *In re Fish* (1), which has just been cited, and *In re Pearce.* (4)

According to the principles laid down in these cases where there is a gift to a class there is a prima facie interpretation of words denoting descent or relationship, which holds the field until it is displaced. So says Lord Cairns. Children as such means legitimate children, as if the word legitimate were put before it, says Lord Hatherley; and any evidence dehors the instrument itself to show that the settlor must have meant to use ordinary words of the English language otherwise than in their usual meaning, cannot be admitted.

If Tee, the father of the appellant, Leong, was not a legitimate son, even in the extended sense in which legitimacy can be predicated of the son of a concubine, evidence that his father treated him as legitimate or called him legitimate, will not be admissible to introduce him into the class of sons and grandsons mentioned in the deed.

The decree of the Court of Appeal, therefore, which varied the judgment of Sproule J., was right. Leong will not be entitled to a sixth share of the settled property unless his father was in the sense already mentioned legitimate (for which purpose the inquiry was properly directed), and the first appeal fails.

The second appeal is governed by different considerations. After the case had been argued before Sproule J., Messrs. Presgrave & Matthews wrote to the appellant stating what

(1) [1894] 2 Ch. 83.
(2) L. R. 6 H. L. 265.
(3) L. R. 7 H. L. 560.
(4) [1914] 1 Ch. 254.

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had taken place, promising to write and inform him of the result, but adding: "We wish you to appreciate that from your point of view the issue is a very doubtful one by reason of the fact that your late father's name is nowhere mentioned in the real estate settlement which is the case with the other sons."

Later on Messrs. Presgrave & Matthews seemed to have requested the appellant to call at their offices, which he did on January 11, 1924, when they told him of the expected hearing of the appeal from the first decree, and suggested that their partner, Mr. Terrell, should be briefed as an additional counsel for him with Mr. de Buriatte. To this the appellant, after he had endeavoured to get an independent counsel, consented.

Though it is not quite certain in which capacity Messrs. Presgrave & Matthews wrote the letter of November 13, it would appear that at this and subsequent interviews they considered themselves as acting for the appellant or for Mr. de Buriatte, who was representing the interests of the appellant.

But the appellant says that this did not occur to him, and, moreover, that he did not know that the whole of these proceedings had been launched by an affidavit of his opponent Kwee, which purported to exclude him from any share, and that this had been filed by Messrs. Presgrave & Matthews, who had taken out the summons. He says that if he had known of this affidavit, he would never have consented to Messrs. Presgrave & Matthews acting for him.

The appellant agrees that on May 29, 1924, after the first decision of the Court of Appeal, he did receive a letter from Messrs. Presgrave & Matthews informing him of the unfavourable result, and saying that the inquiry was proceeding before the registrar, and requesting him to say whether he was prepared to bring forward any evidence that his father was legitimate, and another letter informing him that June 5, 1924, had been fixed for the inquiry.

The appellant says that before the adjourned hearing he suggested to Mr. Terrell that the records of the family kept

in the ancestral temple should be put in evidence. It appears that the gentleman he saw on this occasion was not Mr. Terrell but another partner, Mr. Palgrave Simpson. There is some conflict as to the exact information that the appellant gave to Mr. Palgrave Simpson, and as to the further information which he gave Mr. Terrell on the day of the hearing of the inquiry. But it is clear that on one or other or both occasions he mentioned two records on which he wished to reply, one being the inscription on Tek's tomb, and the other being something which Mr. Terrell calls a "genealogical tree." It is also clear that Mr. Terrell had told him—if Mr. Simpson had not told him—already that these records would be useless, Mr. Terrell's point of view being that as the grandmother was Christian she could not be "t'sip" or confer rights of quasi-legitimacy upon her son. The firm of Messrs. Presgrave & Matthews seemed to have been obsessed by this idea, which accounts for their action or inaction.

When the inquiry came on Mr. Terrell either pressed upon the appellant to offer no evidence, or told him that it was useless for him to offer evidence, and eventually got a permission to state that he proposed to offer none.

The result was that all the registrar had before him was the original affidavit of Kwee and a second affidavit of Kwee's dated February 13, 1924, in which he professed to have consulted the family tree kept at the estate office, and the Sin Chu tablet also kept there, and to give the contents, and in which he omits all mention of the appellant or of the documents or parts of documents on which the appellant relies.

Not unnaturally the registrar with these materials took the view that if the appellant offered no evidence his duty was to find that the appellant's father was not a legitimate son, and he so certified on June 6, 1924.

On June 13, upon an application by way of summons made by Mr. de Buriatte, the appellant was substituted for him to represent the estate of his father and his own.

Thereupon he employed another solicitor, who prepared for him a petition for leave to appeal to His Majesty in Council, and who, as it is said for the first time, became aware in the

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month of October, 1924, of the registrar's certificate of June 6, and thereupon took out, on October 21, a summons to discharge or vary the registrar's certificate, so far as it dealt with the legitimacy of the appellant's father.

This was heard by Whitney J., who dismissed the application. It then came by way of appeal to the Supreme Court, who confirmed this decision; and it is from this confirmation that the present second appeal has been brought.

In his affidavit in support of the summons to vary, the appellant relied upon certain other matters and records as supporting his claim, and these seem at any rate worthy of some consideration.

The registrar's certificate had become binding on June 21, but s. 1004 of the Civil Procedure Code enables the Court to discharge or vary it if the special circumstances of the case require. It was urged on behalf of the respondent that this power was a discretionary one, and that this Board will be very unwilling to interfere on a question of discretion. This is certainly so. But the Courts below have explained the reasons on which they proceeded; and upon the whole their Lordships think that they are not adequate.

The delay in taking out the summons was explained. Owing to the unfortunate double position in which Messrs. Presgrave & Matthews and the various people in their office were placed, the appellant was for some purposes inops consilii. He resided at Kuala Lumpur, some hundreds of miles away on the mainland in one of the protected Malay States.

Then the Courts went on the absence of evidence. But the appellant asked for an opportunity to collect and give that evidence, and he made the point that his opponent had given an incomplete extract of the documents on which he relied. The judges said that the appellant had all the evidence before him when he instructed his counsel on his inquiry before the registrar. But if he had (which is not certain), his counsel had brushed it aside; and, though there are occasions when a litigant must suffer for the mistakes of his advocate, considering the way in which this advocate was selected for him and not by him, and the other interests which he represented,

the appellant ought to be allowed if he has a genuine case still to make it.

Lastly, just as the legal advisers were obsessed with the opinion that the appellant's grandmother was said to be a Christian, as conclusive that she could not be a "t'sip," so the judges in the Court of Appeal seem to express themselves as if this was either an absolute or nearly an absolute bar to the appellant's claim.

Their Lordships think that this view requires reconsideration. To begin with, as counsel for the appellant pointed out, the fact that the woman was a Christian at the date of the deed does not make it certain that she was one when the child was procreated. But there are other considerations. The learned judges seem to have taken the view that as the lady was a Christian the Chinese law of marriage would not apply, and that as the union was polygamous the Christian Marriage Act would not apply.

But it is to be remembered that this is a special kind of union. As the Supreme Court decided, and as this Board decided in the case already mentioned, there need be no ceremony. If consent is enough it is not easy to see why a Christian woman should be held incapable of consent. True her religion forbids a polygamous union, but it also prohibits illicit cohabitation. No question of the law of the Straits Settlements as to Christian marriages arises.

If the woman be free to contract marriage, soluta, and the man according to his personal law is also free, solutus, and the particular class of marriage or union is in the abstract recognized by the law of the land, it may well be that the religious obstacle is no bar.

There are further considerations. In deciding upon a case where the customs and the laws are so different from British ideas a Court may do well to recollect that it is a possible jural conception that a child may be legitimate, though its parents were not and could not be legitimately married.

This principle was admitted by the canon law which governed western continental Europe till about a century ago and governed still later, if it does not govern still, the

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countries of Spanish America: see Esmein, Le Mariage en Droit Canonique, tit. 3, ch. 1, s. 2.

It is also a possible jural conception that a father may legitimate or procure the legitimation of his natural child by a soluta, even if he were himself not solutus. Legitimation per rescriptum principis became at one time almost a matter of routine in Mediterranean countries. An example may be found in the Maltese case of *Gera* v. *Ciantar*. (1)

Their Lordships are conscious that the appellant will, notwithstanding these considerations, find grave difficulties in establishing his case. It is doubtful whether he knows the name of his father's mother. The person apparently suggested may have been mother only by adoption and not by procreation.

But their Lordships think that he has not yet had a proper chance of laying his case before the Courts and should have that opportunity.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed; that the registrar's certificate should be discharged, and that the inquiry as to the legitimacy of Khoo Hun Tee should proceed.

As to costs, the order of the judge of first instance need not be disturbed, but the order of the Court of Appeal with regard to costs must be discharged, and the sum of $250 which was paid out of Court to Messrs. Presgrave & Matthews must be redeposited, and the respondent in lieu will be allowed to take his costs of the appeal as between party and party out of the estate.

The costs of both sides in the two present appeals to His Majesty in Council (other than those already provided for by His Majesty's Order in Council of June 24, 1925, and the Board's order of October 22, 1925) should, in their Lordships' opinion, come out of the estate, but should be taxed as between party and party and not as between solicitor and client. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Gush, Phillips, Walters & Williams.*
Solicitors for respondent: *Nisbet, Drew & Loughborough.*

(1) (1887) 12 App. Cas. 557.

[HOUSE OF LORDS.]

UNITED STATES SHIPPING BOARD . APPELLANTS;

AND

FRANK C. STRICK AND COMPANY, LIMITED . . . . . RESPONDENTS.

H. L. (E.)*
1926
May 6.

Shipping—Charterparty—Demurrage—Commencement of lay Days—"Cargo to be loaded in regular turn as customary" at a stipulated Rate, "commencing when written notice is given of steamer being ready to load."

A ship was chartered to proceed to Delagoa Bay and there load a cargo of coal for carriage to Suez. By clause 3 of the charterparty: "The cargo to be loaded . . . . in regular turn as customary at the rate of 1000 tons per day . . . . commencing when written notice is given of steamer being . . . . ready to load." The ship arrived at Delagoa Bay and anchored within the commercial limits of the port on July 30, 1920, and notice of readiness to load was given on the following day. At Delagoa Bay there was only one loading berth, which was then occupied by another vessel, and the ship had to await her turn until August 26. In the actual loading there was a saving on the time allowed.

Upon a claim by the shipowners for demurrage:—

Held (by Viscount Cave L.C., Lord Atkinson, and Lord Shaw of Dunfermline; Viscount Haldane and Lord Sumner dissenting), that upon the true construction of the contract the obligation to load in turn at the specified rate was to become binding when the notice of readiness was given, but did not become actually operative until the turn arrived.

The Cordelia [1909] P. 27 approved and followed.

Leonis Steamship Co. v. *Rank* [1908] 1 K. B. 499 distinguished.

Decision of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal reversing an order of Rowlatt J., which confirmed an award of an umpire made in the form of a special case.

The appellants were the owners and the respondents were the charterers of the steamship *Hinckley* under a charterparty dated July 30, 1920, which provided that the steamer should proceed to Delagoa Bay and there load a cargo of coal for carriage to Suez. The appellants claimed demurrage in respect of delay at the port of loading, and the matter was referred to arbitration.

* *Present:* VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD SUMNER.

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The substantial question for determination was whether upon the true construction of the charterparty the time for computing lay days and demurrage at the port of loading counted, as the appellants contended, from the time when written notice was given of the steamer being completely discharged of inward cargo and ready to load, or, as the respondents contended, from the time that the ship was at berth in turn to load.

The facts and the material provisions of the charterparty are fully set out in the opinion of the Lord Chancellor, and are summarized in the headnote.

The umpire upheld the appellants' contention, and awarded them demurrage. But, in the event of the Court being of opinion that his conclusion of law upon the construction of the charterparty was incorrect, he made an alternative award in favour of the respondents.

Rowlatt J. confirmed the award in favour of the appellants, but the Court of Appeal (Pollock M.R., Warrington and Scrutton L.JJ.) set aside his order, and held that the alternative award in favour of the charterers was correct.

1926. Feb. 9, 11. *Dunlop K.C.* and *Raeburn K.C.* (with them *Stenham*) for the appellants. Since the decision of the Court of Appeal in *Leonis Steamship Co.* v. *Rank* (1) it has been accepted law that when a place named in a charterparty is a port the lay days begin when the ship is ready and at the charterers' disposal within the named place in its commercial sense, though she may not be at the wharf or dock to which the charterers may properly have required her to go. In the words of Kennedy L.J. " the ship's obligations under such a charterparty, the performance of which must precede the commencement of the lay days, are three. First, the ship must have arrived at her destination, and so be within the designation of an ' arrived ' ship. Till then she is not entitled to give notice of readiness to load. Secondly, she must have given the prescribed notice of readiness to load. Thirdly, she must in fact be, so far as she is concerned, ready to load."

(1) [1908] 1 K. B. 499, 517.

That principle has been the foundation of countless charterparties, and ought not now to be disturbed. It is admitted that each of the said three conditions had been performed when notice of readiness to load was given, and there is nothing in the terms of this charterparty to prevent the usual consequences following upon such notice—namely, the commencement of the lay days. The risk of waiting for turn or waiting for a berth falls on the charterers: *Pyman* v. *Dreyfus* (1); *Hick* v. *Tweedy* (2); *Kokusai Kisen Kabushiki Kaisha* v. *Flack.* (3) In a fixed time charterparty such as this—for it makes no difference whether charterparty names a specific number of days or provides for a given rate per day—the charterer is answerable for the non-performance of the stipulated engagement, whatever the nature of the impediments, unless they are covered by exceptions in the charterparty or arise through the fault of the owner: *Postlethwaite* v. *Freeland* (4); *Alexander* v. *Aktieselskabet Dampskibet Hansa* (5); *Van Liewen* v. *Hollis Brothers & Co.* (6); *Dunlop & Sons* v. *Balfour, Williamson & Co.* (7) In *The Cordelia* (8), upon which the judgment of the Court of Appeal is founded, the Court was not dealing with the question raised in this case.

Sir John Simon K.C. and *Jowitt K.C.* (with them *Naisby*) for the respondents. No case has ever decided that a charterer is liable for demurrage under a charterparty containing a stipulation to load in regular turn as customary at a rate per day where the ship cannot get a loading berth. The rate per day here is not an absolute but a qualified rate, and only applies on the happening of a certain event—namely, the ship getting a berth. There is no justification for disregarding the rest of the sentence, "in regular turn as customary." Upon the construction of this charterparty it is the obligation to load and not the time for loading which commences when notice of readiness is given. "Commencing when" means "but not commencing before," and the true

(1) (1889) 24 Q. B. D. 152.
(2) (1890) 63 L. T. 765.
(3) (1922) 10 Ll. L. Rep. 635.
(4) (1880) 5 App. Cas. 599, 618.
(5) [1920] A. C. 88, 94, 98.
(6) [1920] A. C. 239, 245.
(7) [1892] 1 Q. B. 507, 520.
(8) [1909] P. 27.

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construction of the demurrage clause is that demurrage becomes payable only on a failure to load at the prescribed average rate after (1.) written notice of the steamer being ready to load has been given, and (2.) the regular turn has arrived. This case is governed by *The Cordelia* (1), and that decision is right and ought to be followed; and see *Miguel de Larrinaga Steamship Co.* v. *Flack.* (2)

[On behalf of the respondents it was also contended that the loading of the ship was delayed by obstructions in the docks or other cause beyond the control of the respondents within the meaning of the exceptions clause in the charterparty, but this point was not pressed.]

Dunlop K.C. in reply. *Pyman* v. *Dreyfus* (3) is an answer to the respondents' case. The words "in regular turn" have no relevance in fixing the time. The two parts of the clause are quite distinct. The lay days are not qualified by the fact that the quay can only be reached on a certain day. According to the decision of the Court of Appeal the written notice of readiness to load had no legal effect. It is said that "commencing when" should be read as "not commencing before," but there is no ground for substituting different words. The shipowners' case imposes no such necessity.

The House took time for consideration.

1926. May 7. VISCOUNT CAVE L.C. My Lords, this appeal is concerned with a claim for demurrage. The appellants, the United States Shipping Board, were the owners of a steamship called the *Hinckley*, and chartered her to the respondents by a charterparty, which provided that the ship should proceed to Delagoa Bay and there load a cargo of coal not exceeding 5500 tons to be carried to Suez and there discharged. Clause 3 of the charterparty provided as follows:—

"The cargo to be loaded, subject to port regulations, in regular turn as customary at the rate of 1000 tons per day

(1) [1909] P. 27. (2) (1924) 20 Ll. L. Rep. 268.
(3) 24 Q. B. D. 152.

(excluding bunkering time, Sundays, Custom House, Colliery and local holidays, Easter Monday and Tuesday, Whit Monday and Tuesday, and three days following Christmas Day, and from 1 P.M. on Saturday or the day previous to any such holiday, to 7 A.M. on Monday or the day after any such holiday unless used), commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds and ready to load, such notice to be given between business hours of 9 A.M. and 5 P.M., or 1 P.M. on Saturdays.

If detained longer, charterers to pay demurrage at the following rates: 300*l.* (three hundred pounds) per running day or pro rata for part thereof."

The *Hinckley* arrived at Delagoa Bay and anchored within the commercial limits of that port on July 30, 1920, and on the following day (July 31) her master gave notice of the ship being completely discharged and ready to load. At Delagoa Bay there are no docks, and there is only one berth or loading place at which one steamer at a time can lie and be loaded with coal; and the port regulations provide that all ships calling for coal shall load at this berth by means of the coaling appliance, and that ships shall be berthed at the coaling appliance in order of arrival. Accordingly if, when a ship arrives at the port, there are other vessels lying at the loading place or awaiting their turn to be berthed there, the ship has to lie out in the harbour (where she is still within the commercial limits of the port) until her turn for loading comes. When the *Hinckley* arrived at Delagoa Bay on July 30 a vessel was loading at the coal appliance, and there were other vessels waiting their turn to load coal; and accordingly the *Hinckley* had to lie out in the harbour and await her turn. Her turn came on August 26, and at 9.10 A.M. on that day she got alongside the loading place; and the loading, which was conducted with despatch, was completed at 2.10 P.M. on August 28. Her cargo was 5267 tons of coal, and if this were loaded at the rate of 1000 tons a day it would take about five days and six hours to load; but, in fact, the loading was accomplished (as the above statement shows)

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in about two days and five hours, so that there was a considerable saving on the time allowed.

On October 5, 1920, the charterers rendered an account to the owners for the balance of freight, from which they deducted 462*l.* 10*s.* as despatch money for the time saved in loading. The balance shown by the account was paid to the owners, and the charterers had no further communication with them at that time; but in June, 1922, the owners wrote to the charterers to say that their attention had been drawn to a claim for demurrage on the *Hinckley* for 6397*l.* 1*s.* 4*d.* This claim was based upon the view that, the master's notice of readiness to load having been given at 11 A.M. on Saturday, July 31, 1920, the time for loading then began; and that, a Saturday afternoon and Sunday having intervened, the time for loading expired at 6.24 A.M. on August 7, and the vessel was therefore on demurrage from that time until 2.10 P.M. on August 28. The owners also claimed payment of the 462*l.* 10*s.* deducted from the freight as despatch money; but, as this claim stands or falls with the other, it need not be further mentioned. The claim was disputed, and was referred to an arbitrator, who decided in favour of the owners (the present appellants), subject to a case which he stated for the opinion of the High Court. On the argument of the case stated Rowlatt J. confirmed the award; but on appeal to the Court of Appeal, that Court reversed the decision of Rowlatt J. and decided in favour of the charterers. The owners have now appealed to this House.

The view taken by Rowlatt J. was that the time for loading began to run when the notice of readiness to load was given, although the ship could not then commence loading, but had to await her turn to be berthed. On the other hand the Court of Appeal held that the words in clause 3 "commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds and ready to load" defined the period at which the obligation of the charterers to load in turn became binding, but that this obligation did not become actually operative until the time when the ship's turn to load arrived. The question which

your Lordships have to determine is, which of these two views is correct ?

My Lords, the general rules which in the absence of express words to the contrary govern the construction of charterparties are now well settled. Where, as in this case, the stipulated destination of a ship is a port without further limitation, the ship is an " arrived ship " so soon as she reaches the commercial limits of the port. Where, as here, the charterparty provides for a notice of readiness to load being given by the master, such a notice may be given so soon as the ship is an arrived ship and is in fact ready to load. And where, as here, lay days are fixed, either by a number of days or by a specified daily rate of loading, those days begin to run on the giving of the notice of readiness to load, and as from that time the risk of delay by reason of local impediments falls upon the charterer and not upon the owner of the vessel. All this is clearly established by a series of authorities which cannot now be shaken, including *Tapscott* v. *Balfour* (1) ; *Thiis* v. *Byers* (2) ; *Nelson* v. *Dahl* (3) ; *Pyman* v. *Dreyfus* (4) ; *Leonis Steamship Co.* v. *Rank* (5) ; and *Alexander* v. *Aktieselskabet Dampskibet Hansa.* (6)

But these rules, like all other rules of construction, must yield to the express terms of the contract entered into between the parties ; and if the contract contains terms which are inconsistent with the application of the general rules of construction, the contract and not the rules must prevail. Now, the contract in this case is that the cargo shall be loaded " subject to port regulations in regular turn as customary at the rate of 1000 tons per day " ; and if there were nothing more, I doubt whether any one would say that the charterer had contracted to load out of his regular turn as fixed by the port regulations, or to pay demurrage or damages if he failed to do so. If the contract had been only to load " in the usual and customary manner," those words must have been held

(1) (1872) L. R. 8 C. P. 46.
(2) (1876) 1 Q. B. D. 244.
(3) (1879) 12 Ch. D. 568.
(4) 24 Q. B. D. 152.
(5) [1908] 1 K. B. 499.
(6) [1920] A. C. 88.

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(as in *Tapscott* v. *Balfour* (1)) to refer to the mode and not to the time of loading; but the contract is to load "in regular turn as customary," and the expression "in regular turn" has reference to succession, and therefore to the time and not only to the mode of loading. The contract is to load in regular turn at a daily rate of speed, that is to say, to commence loading when the turn arrives and then to continue at the stipulated speed; and if this were all, the charterer could hardly be held to be in default or liable to demurrage only because he had awaited his turn to be berthed before commencing to load.

The cases in which the expression "in turn" or other like expressions have been considered appear to me to be wholly consistent with this view. In *Robertson* v. *Jackson* (2) the charterers had engaged that the vessel should carry a cargo of coal to Algiers and there be unloaded at the average rate of not less than twenty tons of coal per day (Sundays excepted), and if detained on their part during a longer period they engaged to pay for such detention at the rate of 5*l.* per day, "to reckon from the time of the vessel being ready to unload and in turn to deliver"; and it was held that the words "in turn to deliver" put the owner on inquiry as to the regulations in force at the port of discharge, and must be interpreted with reference to those regulations. In *Leidemann* v. *Schultz* (3) the charterparty provided that the ship was to proceed to Newcastle, "and on arrival there be ready forthwith in regular turns of loading to take on board, by spout or keel, as directed," a cargo of coal and coke. The ship arrived in Newcastle, and was able to load the coal at once, but had to wait more than a month for her turn to be loaded with coke. In an action against the charterers for the detention, it was held that the expression "in regular turns of loading" pointed to a course of dealing outside the instrument, and that evidence should have been admitted as to the practice of the port for ships to load coke in turn. In *Lawson* v. *Burness* (4) the charterparty provided that the

(1) L. R. 8 C. P. 46.
(2) (1845) 2 C. B. 412.
(3) (1853) 14 C. B. 38.
(4) (1862) 1 H. & C. 396.

ship should proceed to a certain dock and there load a cargo of coke, "to be loaded in regular turn." It was held that the words "in regular turn" referred to the order of readiness to load and not to the order of entry in a book kept by the colliery company of which the owner had no knowledge, and demurrage was allowed; but it was assumed throughout that, if the vessel had been loaded in her order of readiness, though not immediately on her being ready, no demurrage would have been payable. In *Postlethwaite* v. *Freeland* (1) the charterparty merely provided that the cargo was "to be discharged with all despatch according to the custom of the port," and the discharge could only be effected by a warp and lighter, which were under the control of a company, and which vessels were allowed to use in turn according to the order of their arrival. Owing to congestion in the port the vessel had to wait for thirty-one days before she could be discharged, and it was held that no demurrage was payable. In *The Cordelia* (2), where it was agreed by the charterparty that a vessel should proceed to the Nob and deliver the cargo "in regular turn with other seagoing vessels at an average rate of 30 tons per weather working day," and the vessel was kept waiting while another vessel also consigned to the charterers was being discharged, it was held that "in regular turn" meant one vessel at a time, and that no demurrage was payable. In this case Gorell Barnes P., in giving judgment, said: "It looks to me as if the plaintiff [the owner] expected that his vessel would find a string of barges when she got to the Nob. I am afraid the plaintiff could not reasonably expect more than that he should have his vessel discharged in regular turn with other seagoing vessels which were being discharged in turn and with the usual despatch. The terms of the charterparty do not justify the plaintiff in expecting more than that."

There remain two cases which have many points of resemblance to the present case. In *Kokusai Kisen Kabushiki Kaisha* v. *Flack* (3) a vessel had been chartered to load coal

(1) 5 App. Cas. 599. (2) [1909] P. 27, 31.
(3) 10 Ll. L. Rep. 83, 85, 635, 638.

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at Delagoa Bay and carry it to another port. The charterparty (like the charterparty in the present case) was based upon the Chamber of Shipping Welsh Coal Charter, certain words only having been altered. The ship got to Delagoa Bay, and her master gave notice of readiness to load; but she had to wait her turn to be berthed at the coal appliance, and one question raised was whether the lay days began on the notice of readiness being given. The facts were therefore very like the facts in this case, but unfortunately the decision of the Court did not cover the point now in dispute. The arbitrator to whom the claim had been referred was asked to deal first with certain preliminary questions, one of these questions being whether the ship when she lay at anchor in Delagoa Bay and purported to give a notice of readiness to load was an "arrived ship." This question was answered both by the arbitrator and McCardie J. in the affirmative, and their decision was affirmed by the Court of Appeal; but no question was submitted or argued as to the meaning of the words "in regular turn" or as to the effect of those words on the commencement of loading time, and these questions appear to me to have been left open in both Courts: see per McCardie J. and per Scrutton L.J. But at last, in *Miguel de Larrinaga Co.* v. *Flack* (1), the very point came up for decision. In that case also the charterparty was based on the "Welsh Coal" form used in the present case, and contained the words which I have quoted above. The vessel arrived at her place of destination, the port of Philadelphia, on June 23, 1920, and on June 25 her master gave notice of readiness to load; but owing to congestion in the port she had to await her turn for a berth, and on July 16 the charterers declared the charter null and void. The owners claimed (among other things) demurrage from July 4 (when the lay days if counted from the notice of readiness to load would have expired) until July 16, but the arbitrator disallowed the claim. When the matter came before Roche J. on a case stated by the arbitrator, the owners declined to further argue the point; but Roche J. expressed

(1) 20 Ll. L. Rep. 268, 270.

his concurrence with the decision of the arbitrator, which he described as follows: "In the ordinary case she would not be an arrived ship until she got into dock, but having regard to the particular provision of the charterparty the contention was open to the charterers, and was availed of by them and accepted by the umpire, that, though an arrival might have been fixed and stipulated by the provisions which I have read, the obligation to load at a certain specified rate per day did not arise until the vessel was 'in turn,' that is to say, was at the pier, and was there to load as customary. Accordingly, the umpire decided that, the vessel not having come on turn before July 16, the obligation on the charterers to load and to pay demurrage never had arisen."

At a later stage of his judgment the learned judge, when dealing with the paragraph avoiding the charter in certain events, said: "It would appear that there are strong grounds for saying that the time when readiness to load was to be regarded for the purpose of clause 3, and when written notice could be given, which dated the time when the obligation to load began, did not arise or occur until the vessel was ready in turn as customary."

My Lords, I have thought it desirable to refer to these authorities—the only reported cases in which (so far as I am aware) the expression "in turn" or "in regular turn" has been the subject of decision—in order to make it clear that our Courts have uniformly given effect to those expressions as having a bearing on the question of lay days. In most, if not all, of the cases the ship in question was an arrived ship and ready to load, but it was nevertheless held or assumed that the commencement of the loading or unloading days was by the terms of the contract postponed until the ship's "turn" arrived. Nor is the inference to be drawn from these authorities affected by the decisions in *Tapscott* v. *Balfour* (1) and *Leonis Steamship Co.* v. *Rank* (2), the charterparties in those cases not containing the words "in turn" or any similar expression.

It is only necessary to add on this point that the owners

(1) L. R. 8 C. P. 46. (2) [1908] 1 K. B. 499.

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in the present case had full knowledge when the charterparty was signed of the regulations as to loading prevailing at Delagoa Bay. The words of the charterparty would in any event (as appears from *Robertson* v. *Jackson* (1) and other cases) have put them on inquiry; but any doubt is removed by the fact, inferred by the arbitrator from the correspondence between the parties, that "the owners expected the vessel to be delayed at their expense before getting a loading berth and fixed their freights accordingly." This inference, assuming it to be correct, cannot alter the meaning of the charterparty, but it is evidence to show that the parties contracted with knowledge of the local conditions.

But the appellants rely on the words which occur later in the clause—namely, "commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds and ready to load"—and no doubt these words require very careful consideration. For this purpose the words in brackets, which exclude certain days from the calculation, may for the moment be omitted, and the clause may be treated as if it ran as follows: "The cargo to be loaded subject to port regulations in regular turn as customary at the rate of 1000 tons per day . . . . commencing when written notice is given of steamer being . . . . ready to load." What, then, do the words "commencing," etc., mean? I do not think it would be right to read them as wholly nullifying the expression "in regular turn" occurring earlier in the clause, and an endeavour must be made to reconcile the two expressions. There is no noun to which the word "commencing" may properly be referred, and it might conceivably be read as meaning "loading commencing" or "time for loading commencing"; but neither reading would give full effect to all the words of the clause. The expression "commencing," etc., is harnessed to a clause which includes an obligation, not simply to load within a fixed time, but to load in regular turn at a fixed rate; and I think that the true meaning of the clause is that the obligation to load in turn at the specified rate is to become

(1) 2 C. B. 412.

binding when the notice of readiness is given, although that obligation cannot become actually operative until the turn arrives. In other words, to the three conditions for the commencement of the lay days enumerated by Kennedy L.J. in *Leonis Steamship Co.* v. *Rank* (1)—namely, arrival of the ship, readiness to load and notice of such readiness—there is added by the terms of this charterparty a fourth condition—namely, the arrival of the turn. If the loading berth had been empty when the ship arrived in port the time would not have commenced to run until notice of readiness had been given; and if notice of readiness is given before the berth is empty and ready to receive the ship, then the time does not run until the regular turn for loading arrives. This is the construction which was put upon the clause by Scrutton L.J. and the other members of the Court of Appeal, and it appears to me to be the only construction which gives effect to all the terms of the contract.

This conclusion, at which I have arrived on the first paragraph of clause 3 of the charterparty taken alone, is supported by two other paragraphs occurring later in that clause. These paragraphs are in the following terms:—

"In the event of any stoppage or stoppages arising from any of the above causes continuing for the period of six running days from the time of the vessel being ready in turn to load, this charter shall, provided however that no cargo shall have been shipped on board the steamer previous to such stoppage or stoppages, become null and void."

"In the event of such stoppage or stoppages commencing after the vessel is ready to load in turn and continuing for six running days, this charter shall on the expiration of such period, provided that no cargo shall have been shipped on board the steamer previous to such stoppage or stoppages, become null and void."

In each of these paragraphs the words "in turn" have been inserted in the print, and the effect is to make it clear that the charter is not to be avoided by reason of a stoppage occurring before the vessel is in turn to load. This express

(1) [1908] 1 K. B. 517.

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limitation of the power to avoid the charter appears to me to support the view that the time for loading does not run until the turn arrives.

It was suggested by counsel for the respondents that, assuming the time to have begun to run at the date when notice of readiness was given, they could rely upon another paragraph of clause 3, by which it was provided that any time lost through (among other things) obstructions in the docks " or any cause beyond the control of the charterers " should not be computed as part of the loading time ; but this point was not fully argued, and I do not base my opinion upon it.

For the above reasons I am of opinion that the decision of the Court of Appeal was right, and accordingly that this appeal fails; and I move your Lordships that it be dismissed with costs.

LORD ATKINSON. My Lords, it is well established that where a ship in which goods are to be carried is employed under a charterparty, the following conditions must, prima facie, be fulfilled by the shipowner before he becomes entitled to call upon the charterers to ship his goods. The ship must be at the place of loading contemplated by the charterparty, must be ready to receive the goods on board, and due notice of that fact must be given to the charterers.

In this connection the term " port of loading " must, prima facie, be taken to mean not the geographical, fiscal or pilotage port, but the commercial port, that is, the area known and treated as the " port " by persons engaged in shipping merchandise whether as shippers, charterers or shipowners : *Sailing Ship " Garston " Co.* v. *Hickie & Co.* (1) ; *Leonis Steamship Co.* v. *Rank.* (2)

As between charterer and shipowner, a ship is not to be considered as at a port, in a commercial sense, until she has reached the usual place in the port at which vessels intended to be loaded lie. In ordinary cases, where there is no demise of the ship and the time for the loading or the discharge of the cargo, as the case may be, is definitely fixed, or is so

(1) (1885) 15 Q. B. D. 580. (2) [1908] 1 K. B. 499.

described as to be calculable beforehand, an absolute obligation rests upon the charterer to have the particular work completed within the time fixed, whatever, with the exception mentioned, may occur. He is answerable, though the completion of the work be rendered impossible from causes which have arisen without any fault or omission on his part. Thus the charterer must bear the risk of delay arising from the crowded condition of things at the place at which the ship is to load or discharge, as the case may be: *John Potter & Co.* v. *Burrell & Son* (1), and he takes the risks, although the shipowner should be prevented from doing his part of the work within the agreed time, unless the latter is in fault in the matter.

The charterer's contract is in effect this—that if the ship is not able to load or to discharge, as the case may be, the whole of her cargo within the number of days fixed for the particular purpose after she has come to the usual place for carrying out that purpose, he will pay for the delay, however caused, otherwise than by the default of the shipowner. But, of course, it is quite competent for the parties to a charterparty, by a provision, legal in character, inserted in it, to agree to modify as between themselves the rights and obligations which, according to the general law, would spring from the relation in which they stand to each other. The question for decision, or one of the questions for decision in this appeal, is whether they have done that in this case and, if so, to what extent have they done it, and with what consequences.

In my view the parties to the charterparty in this case have entered into an agreement of this character, and on the facts found by the arbitrator, the consequence flowing from it is that the right of the shipowners to recover the demurrage they claim cannot be supported. The arbitrator finds that the *Hinckley* arrived at Delagoa Bay and anchored within the commercial limits of the port at 9.50 A.M. on July 30, 1920. What is the extent of the area of water within those limits is not mentioned, nor is it shown by map or otherwise

(1) [1897] 1 Q. B. 97.

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what was the precise place of the ship's anchorage. On the ordinary maps Delagoa Bay would appear to be a large bay. By the third article of the charterparty it is expressly provided that the cargo is to be loaded "subject to the port regulations in regular turn as customary." Mr. Dunlop, on behalf of the appellants, argued that every vessel which goes to a port to load or discharge a cargo is bound by the ordinary regulations of the port whether those regulations are referred to or not in any charterparty or other contract dealing with the adventure. That may be, but the fact that by the express provisions of the charterparty those regulations are made applicable to the adventure entitles one to examine the regulations themselves in order to ascertain, if possible, what was the precise nature of the adventure, what were the conditions attaching to its performance, and what the rights and obligations respectively conferred and imposed upon the parties concerned in the conduct of it.

The most important of these obligations touching the matter in hand run as follows :—

"Article 2. Applications for a berth must be made to the wharfmaster by the owners, agents, or captain of a ship on the prescribed form (Form No. 1). The wharfmaster, on receipt of the application for a berth as well as the telegraphic notification of the maritime department regarding the ships entering the harbour, will assign berth for such ships at the wharf and advise the port captain and the Customs according (Form No. 2).

"Article 3. Ships will be berthed, as a rule, in the order they enter the port, it being understood that the ship has entered the port when she has crossed westwards the line passing through the Ponta Vermelha buoy and the Catembe Lighthouse.

"In case of dispute as to the priority of entrance to the port the port captain's decision shall be final.

"Article 24. All ships calling for cargo coal shall load at the berth assigned for that purpose by means of the coaling appliance, unless special reason is shown, through

the wharfmaster, to the satisfaction of the director of the port.

" Article 25. Ships shall be berthed at the coaling appliance in order of arrival; this rule may be altered in cases of urgency or when the director of the port may think fit to vary the order of preference."

If these regulations are to be construed according to the ordinary meaning of their language, it does not appear to me that it is possible to hold that it was in the contemplation of the parties bound by them that ships frequenting the commercial port of Delagoa Bay were to be loaded or discharged in any part of that harbour other than at one of the berths indicated by the regulations.

The adventure in which both the appellants and the respondents were concerned was in effect according to the first article of the charterparty this—that this ship, the *Hinckley*, being taut and strong and in every way fitted for the voyage, should with all possible despatch sail and proceed to Delagoa Bay, and there, at one of the berths provided for her under the regulations of the port, always afloat, load in the customary manner for the shippers a full and complete cargo, etc., etc.

The third article of the charterparty provided that written notice was to be given of the steamer being completely discharged of inward cargo and ballast in all her holds and ready to load.

The arbitrator has found that a notice to this effect was given by the master at 11 A.M. on July 31, 1920. That notice indicates clearly what the condition of the steamer was—namely, that she was empty and in a state fit to receive a cargo, but having regard to the facts found and the provisions of the regulations, it is impossible, it would appear to me, to hold that she was ready to load her cargo in the place where she lay. The regulations by which she was bound forbade that, and the facts found by the arbitrator in paras. 2 and 4 of his award clearly show that to do so would be contrary to the regulations of the port, even if it were physically possible, which would appear to be doubtful. He

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finds that there are no docks at Delagoa Bay, that there is only one berth or tip or loading place alongside which one vessel at a time can lie and be loaded with coal by some appliances; that if, when a vessel arrives at Delagoa Bay, another vessel should be lying at this loading place, the former has to lie out in the bay or harbour to await her turn; that if other vessels are already so awaiting their turn they have to take their turns to come to the loading place according to the regulations of the port.

In para. 4 he finds that when this steamer, the *Hinckley*, arrived at the port and anchored within its commercial limits, a number of vessels were already there waiting to load, and that the *Hinckley* lay with them in the harbour taking her turn according to the regulations.

There is nothing in the evidence in the case to show that this condition of things was exceptional. From the regulations one, I think, would be led to the conclusion that it was the usual or ordinary condition of things. It was to such or a similar condition of things, it would appear to me from the language of the third paragraph of the charterparty, that it was designed that document should apply and was framed to meet. The following words in the opening lines of the paragraph clearly show this. They run: "The cargo to be loaded subject to port regulations in regular turn as customary at the rate of 1000 tons per day." It would appear to me that it was in the carrying out of the operation described in these words that the rate of loading specified was to be observed, and not in the carrying out of some other operation under wholly different restrictions and forbidden by the regulations of the port.

This provision as to the thousand tons a day, of course, does not mean that a thousand tons precisely were to be loaded every day till the entire cargo was loaded. It would be quite competent for the parties to load 1500 tons one day and 500 tons the next. The result aimed at was that the whole cargo should be loaded in five days or thereabouts.

Those operations were of the kind found by the arbitrator

to be such as are described by him in the second and fourth paragraphs of his award. I cannot see upon what principle the rate of loading was to be measured or fixed by a process of loading which upon the facts found was either impossible or prohibited.

The arbitrator has found as a fact that the *Hinckley*, taking her turn according to the regulations, got alongside the loading place at 9.10 on the morning of August 26, 1920; that her loading was finished at 2.10 P.M. on August 28; that her cargo was 5267 tons of coal; that if this were loaded at the stipulated rate of 1000 tons per day, her loading of her cargo would have taken five days six hours, so that in fact she loaded within less than half of her lay days, if these were fixed by the stipulated rate, and the shipowners would tehrefore, on this assumption, have no claim for demurrage, and, lastly, the arbitrator has found as facts, in para. 9 of his award, that the charterers could not load the vessel in the customary or any other manner until she got alongside the one loading place; that under the regulations of the port the *Hinckley* was prevented from getting there till August 25, 1920; that this hindrance was caused by the presence of other ships waiting in port, waiting to load coal and having under the regulations prior turns.

Having regard to these facts so found, I think the principle upon which the case of *The Cordelia* (1) was decided applies to this case, that the ship was loaded within the lay days fixed in the only way in which they could be fixed and in accordance with the port regulations, and that the shipowners therefore had no sustainable claim for demurrage against the charterers.

The appeal, I think, should accordingly be dismissed with costs.

Mr. Dunlop endeavoured to get over the difficulty which the opening words of the third paragraph of the charterparty placed in his way by contending that the charterparty should be construed as if this vital clause was deleted from it. That was a very bold contention, but in my view as

(1) [1909] P. 27.

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unsound as it was bold. There is in the case, in my view, no principle involved, no fact found which would justify such a mutilation of the governing agreement into which the parties have entered, and by which they are bound in its integrity.

LORD SHAW OF DUNFERMLINE (read by LORD CARSON). My Lords, I feel loth to add anything to the judgment of my noble and learned friend Lord Atkinson, which has just been read by him to the House, and in which I concur. I venture to add the following words to indicate that in my view the terms of the charterparty taken along with the port regulations are conclusive of the issue between the charterers and the owners of this vessel and determine that issue in favour of the charterers.

There is reference in the charterparty to these port regulations at Delagoa Bay, and by the 24th and 25th of them it is provided that the regulations may be subject to exception. In the first case, an exception may be made from loading at the berth assigned for a special reason "through the wharfmaster to the satisfaction of the director of the port." In art. 25 the rule of berthing at the coaling appliance in order of arrival may be altered in case of urgency or when the director thinks fit. In neither of these cases was there any alteration or exception made, and the rules accordingly are to be read absolutely.

I now articulate the points of the charterparty and regulations leading up to the payment of demurrage.

Under art. 1 of the charterparty the ship is to proceed to Delagoa Bay and there load, always afloat, in the customary manner.

Under art. 3 the cargo is to be loaded (1.) subject to port regulations, that is to say, at the berth assigned for that purpose, by means of the coaling appliance; (2.) the ship is to be berthed at the coaling appliance in order of arrival, and the cargo is to be loaded in regular turn as customary at the rate of one thousand tons per day; (3.) "commencing" —that, in my opinion, clearly means "the loading

commencing," or "commencing loading" as per the contract stipulations—namely: (*a*) in turn, (*b*) as customary, (*c*) at the berth assigned, and (*d*) by means of coaling appliance; (5.) the rate of loading to be not less than 1000 tons a day; (6.) if detained longer, charterers are to pay demurrage at 300*l*. per day.

The argument for the owners is that the lay days began when notice was given that the vessel had arrived at Delagoa Bay. The notice, it is said, embraced the terms that the vessel was ready to load. In my opinion this was a notification that so far as the ship was concerned she was in a condition fit to receive cargo. But it is not denied that the vessel, after giving, according to contract, notice of her arrival in Delagoa Bay and readiness to take cargo, was nevertheless quite helpless so far as the last mentioned operation—namely, of loading—was concerned until her turn came and she was properly berthed at the coaling appliance. Had any attempt been made to force an earlier berthing or loading, or a berthing and loading in a different place or manner, the conduct of the charterers would have been in violation of their contract by the charterparty with the owners.

I cannot see my way to countenance a construction of this charterparty which would compel that result.

This is not a case in which it was stipulated that the loading was to be completed at a fixed date. The case depends entirely upon when loading was to commence. Once commenced it must take place at a fixed rate. It would on a reckoning of the cargo to be handled last five and a half days. Those lay days concluded, demurrage would run. But the loading was so expeditious as to be well within the lay day period.

It would be a very remarkable result to hold that demurrage for days or weeks or months was running against the charterers before it was possible that loading in terms of, and not contrary to, the stipulations of the charterparty itself, could have begun.

I do not think it to be in accordance with law that demurrage

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should be accumulated against the charterers in such circumstances, and apart from a clear and definite stipulation in the charterparty to such an effect.

I think that the judgment of the Court of Appeal is right.

LORD SUMNER. My Lords, this appeal relates to the construction of a clause in a common form of voyage charter, of which every phrase and almost every word and collocation of words is familiar and has been the subject of repeated decisions for thirty years and more.

Rowlatt J., affirming the learned umpire, read the clause as providing that laying time began to run when the ship, being then "arrived," duly gave her notice of readiness. He rejected the charterers' contention, which then was "that the time, which then began to run, was time not merely measured in hours but time measured by the port regulations, which limited the available time, and by the ship being in turn," and he held, that he was not entitled to read into the notice of readiness clause, as this argument does, such words as "being then in berth" or "being then in turn" or both, for the two expressions are not identical. With this I agree. Every phrase is given its accepted meaning. No prior decisions are disturbed. The construction is without difficulty, apart from the purely linguistic one of saying to what noun substantive "commencing" attaches itself, and as for the effect in distributing the risk of delay to the ship, that is a mere affair of business for the parties themselves. It always is.

This judgment was reversed in the Court of Appeal, and the Lords Justices, though differing considerably in their reasoning, concur in one conclusion—namely, that what "commences" is the obligation to load, not the laying time, and that, until the ship is in regular turn to load, the obligation to load cannot commence. I think, further, that they considered the language of this charter to be distinguishable from other texts which have long received a settled construction in judicial decisions, because in this case the words as to the manner, in which cargo is to be loaded, run on in

one sentence continuously with the words as to rate of loading and as to notice of readiness, and because, further, no substantive is expressed to which the participle " commencing " is referred.

Before passing from these judgments I wish to draw attention to Warrington L.J.'s view, which appears to be that the ship's lay time would not have begun till her regular turn to load had arrived, if there had not been a special clause fixing its commencement (if it did so fix it) with reference to the ship's notice of readiness, and that accordingly the burden is on the ship to express in unambiguous words this special modification. On the contrary, if this clause in effect prevents lay days from running till the ship gets her regular turn and (I suppose) is in berth, it is evidently a stipulation in the charterer's favour. Such a clause must be construed contra proferentem and also, as Lord Macnaghten says in *Elderslie S.S. Co.* v. *Borthwick* (1), in such cases an ambiguous clause is no protection. Now who can say this clause is unambiguous, after considering how many transpositions of words, which are expressed, and how many implications of words, which are not, the construction claimed by the respondents in effect requires ? The Lord Justice, I think, overlooks the effect of the rule as settled in *Leonis Steamship Co.* v. *Rank.* (2) The matter really depends on clause 1. If that clause names a destination, which is reached before the ship gets to her berth or can get there, she is " arrived " nevertheless, because she has performed the part of the agreed voyage, which is preliminary to arrival, and therefore her laying time begins to run, unless in some other part of the charter this is unambiguously varied. If the sub-sentence which begins with " commencing " refers to lay days, such a variation is effected but quite unambiguously, for the terminus a quo is fixed by a notice that the ship is ready, that is, ready in herself. If it refers to loading, then the above rule as to laying time is unvaried, unless it can be shown that, by including the words as to rate of loading in the same sentence as those providing for the manner of

(1) [1905] A. C. 93. (2) [1908] 1 K. B. 499.

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loading, the charter has been taken out of the "fixed lay days" class, which I submit is contrary to all the weight of authority.

So much for the Court of Appeal, but, as the result of the argument at your Lordships' Bar, two further views have been arrived at and clause 1 is now dealt with as well as clause 3.

The effect of the first view, in which two of your Lordships concur, is that the words in clause 1, "shall proceed to Delagoa Bay and there load," are to be interpreted as if they read: "shall proceed to Delagoa Bay, and there, at one of the berths provided for her under the regulations of the port, load." Such is the adventure, for the carrying out of which the subsequent clauses provide. No stress is laid upon the words "in regular turn," or on the condition which they express. I agree with Scrutton L.J. that explicit mention of port regulations adds nothing. In performing the operation of loading compliance with them would in any case be implied, though it is a separate question, which party has to pay for any delay they cause. It follows that, on this view, a "port" charter is converted into a "berth" charter, wherever, at the named port of loading, port regulations in fact deal with the berths in the port, and this whether there are or are not any such express words as "at any berth as ordered by charterer," which are in common use. If this view be right I do not understand how any of the cases, which were settled by *Leonis Steamship Co.* v. *Rank* (1), were ever disputed at all, for if the whole adventure involves loading under port regulations at a berth, and if, therefore, lay days cannot begin till the ship is in berth in turn, the whole distinction between charters to a port and charters to a berth was all along illusory. This conclusion makes me regret the more the very sparing way in which the respondents' counsel assisted your Lordships by reference to the authorities. It was repeatedly and pointedly declared by the appellants that the respondents had, throughout, never questioned that the *Hinckley* was an "arrived" ship, and I never heard this challenged. *Leonis Steamship Co.* v. *Rank* (1) and the

(1) [1908] 1 K. B. 499.

very numerous cases which were summed up in or follow on that decision, were not discussed. Nevertheless, the above view overrules this extensive chapter of shipping law, for it is, in brief, a decision that the *Hinckley* was not an arrived ship at the material time. I admit at once that none of these cases bind your Lordships; they are decisions of inferior Courts, and your Lordships are free to overrule them if you think fit, in spite of all that has been said so often about the importance of following well established rules in commercial matters: *Nelson* v. *Dahl* (1), per Brett L.J.; *Dunlop & Sons* v. *Balfour, Williamson & Co.* (2), per Lord Esher M.R. and per Fry L.J.; and *Castlegate Steamship Co.* v. *Dempsey* (3), per Lord Esher M.R. and per Fry L.J. Framers of charterparties and their advisers must begin again, for nearly all loading ports have port regulations, and shipowners will not always submit to bear the risk of detention awaiting a berth at the port of the charterer's choice.

This view is further developed thus: "Under article 3 the cargo is to be loaded 'in regular turn as customary at the rate of one thousand tons a day'; (3.) 'commencing'—that in my opinion clearly means commencing loading—(*a*) in turn, (*b*) as customary, (*c*) at the berth assigned, and (*d*) by means of coaling appliance; (5.) the rate of loading to be not less than 1000 tons a day."

This, I take it, means that the fixed rate is to be observed in carrying out, and therefore is subject to the hindrances involved in carrying out, the described operation, and that, as observance of customs which apply during loading is as obligatory as submission to regular turn before beginning to load, "commencing," which refers to loading, must include "continuing" that loading during the whole of the process in accordance with custom. It was exactly to get rid of questions of delay to the ship by having to load under local and temporary conditions of loading, that fixed days were introduced: *Thiis* v. *Byers* (4), per Blackburn and Lush JJ., questions which must otherwise always turn up, because

(1) 12 Ch. D. 568, 588.
(2) [1892] 1 Q. B. 507, 518, 520.
(3) [1892] 1 Q. B. 854, 858, 861.
(4) 1 Q. B. D. 244, 246.

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compliance with local customs as to the manner of loading is implied even if not expressed: *Postlethwaite* v. *Freeland* (1), per Lord Blackburn. The effect of the proposition above set out is to neutralize the benefit, for the sake of which lay days are fixed or made capable of being fixed.

I respectfully submit that the settled law, as to the distinction between charters with fixed laying time and without it, is to make words, which fix a rate of loading, dominant over words, which relate to the mode of loading, and (subject to the questions of "arrival" and of lay days "commencing") are also dominant over provisions, whether express or implied, relating to regular turn or ready berths. This must be so, because they are the parties' own express and exclusive provision as to time, and, as Lord Blackburn quotes from Abbott on Shipping, the charterer "has engaged that it shall be done": *Postlethwaite* v. *Freeland*. (2) Without such words the law deals with the matter. Provided that each party does his part in a time which is reasonable under the circumstances, he is not in breach. Days fixed by the parties oust this rule of law and a fortiori so when, as here, they not only express a number of days but express the excepted days that are not to count, and so include all other time, whether occupied by compliance with regulations or customs or not. I think this consideration is binding de jure in the present case.

The general rule as to the effect of the words in clause 1 "shall sail and proceed to Delagoa Bay and there load" has been settled for much over half a century. I quote *Tapscott* v. *Balfour* (3); though not the origin of the rule, which is considerably older, this case has always been regarded as authoritative. It was held that, in a charter to proceed to a dock to be named, the shipowner had done all that he was required to do, when the ship had got into the dock, though the dock was then so crowded with shipping, that she could not get to a loading berth. The loss fell on the charterer, and this although the charter contained the words

(1) 5 App. Cas. 599, 613. (2) 5 App. Cas. 618.
(3) L. R. 8 C. P. 46.

" in the usual and customary manner," which were held to apply only to the mode of loading and not to the place to which the shipowner undertakes that the ship is to proceed.

My Lords, a second view is now developed that, as the expression " in regular turn " refers to succession and therefore to the time and not only to the mode of loading, this charter, thus worded, adds to the three conditions of arrival specified by Kennedy L.J. in *Leonis Steamship Co.* v. *Rank* (1), a fourth—namely, the arrival of the turn—and that consequently, while the obligation to load in turn at the specified rate becomes binding when the notice of readiness is given, it only becomes operative when the turn arrives. I respectfully fail to understand why the words " in regular turn " should have any special effect in setting aside the general rule. No one has pointed out any distinction between binding local regulations and binding local customs, and regular turn is a local custom. The Master of the Rolls thinks that perhaps, because they are tautologous as expressive of an obligation to submit to a turn, these words ought to be read as a special provision, which converts them into a condition precedent to the attaching of the obligation involved in the fixed rate of loading. The rule of construction, no doubt, is to read a contract so as to give effect to every word, but it is new to utilize tautologies by applying them to an alien subject-matter and in a sense which they do not express.

I think, however, that the judgments in the Court of Appeal generally did not purport to qualify, still less to disapprove, *Leonis Steamship Co.* v. *Rank* (1) in any way; they only found in the doubt as to the word to be supplied before " commencing " a ground for holding that in effect *Leonis Steamship Co.* v. *Rank* (1) does not apply. I now gather that it is really these words " in regular turn " which are to constitute in this case the express terms of the contract that " are inconsistent with the application of general rules of construction, such as those " in *Tapscott* v. *Balfour* (2); *Thiis* v. *Byers* (3); and *Leonis Steamship Co.* v. *Rank.* (1)

(1) [1908] 1 K. B. 499. (2) L. R. 8 C. P. 46. (3) 1 Q. B. D. 244.

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My Lords, I think there has been some misapprehension as to the effect of the authorities on the words "in regular turn." Most of the cases on them simply raise the question whether evidence is admissible to explain what "in regular turn" means, and, if so, what the regular turn of the particular place is: *Leidemann* v. *Schultz* (1); *Taylor* v. *Clay* (2); *Lawson* v. *Burness* (3); *King* v. *Hinde.* (4) Only three are cases where the charter contains any provision for a fixed rate as well, and of these *Robertson* v. *Jackson* (5) expressly removes any difficulty by saying that, for the purpose of payment for detention beyond the time calculated at the fixed rate, the reckoning was to be from the time the vessel was ready to unload and in turn to deliver. We get no help from this.

Another is *The Cordelia* (6), upon which alone the Court of Appeal placed definite reliance. The Master of the Rolls merely said that in *The Cordelia* Sir Gorell Barnes P. "gives a full and important meaning to the words 'in regular turn,'" which is true of that and of all other cases on their meaning, but both Warrington and Scrutton L.JJ. regard it as a decision on the question, whether or not *The Cordelia* was an arrived ship, and apparently they thought that she was not. I am quite unable to see that the case of *The Cordelia* is a decision on "arrived ship" at all. Why does so careful and experienced a judge say nothing about the ship's arrival, but merely affirm the finding of the Court below, as to what regular turn was at Topsham? He discusses what the shipowner expected to find when his ship got to the Nob, which was the place to which she was ordered in accordance with the charter "on arrival at Topsham." He says that she could not reasonably expect more than to be discharged in regular turn, which in fact was "one at a time." These expressions are apt, if the ship's case was that being arrived, she was ready to deliver at the stipulated rate, if only the charterer had been ready with barges, as he

(1) 14 C. B. 38.
(2) (1846) 9 Q. B. 713.
(3) 1 H. & C. 396.
(4) (1883) 12 L. R. Ir. 113.
(5) 2 C. B. 412.
(6) [1909] P. 27.

should have been under the words "in regular turn," but they are quite inept, if the issue was arrived or not arrived, in which case the ship's expectations did not matter, the only point being in turn or out of it. I cannot believe that so important a question would have been decided without reference to a single case out of the many then in the books upon the subject, or doubt that, if that had ever been the point, the President would have reserved judgment, for this simple reason that *Leonis Steamship Co.* v. *Rank* (1) was then awaiting judgment in the Court of Appeal. In fact, judgment was delivered just three days afterwards—namely, November 21, 1908. The profession has always taken the case of *The Cordelia* (2) to be one of evidence upon the meaning of "regular turn." The fifth edition of Carver on Carriage by Sea did not even quote it, but the sixth (p. 620) and the editors of the twelfth edition of Scrutton on Charterparties (p. 358) so treat it, and in my opinion rightly.

The remaining case is *Kokusai Kisen Kalushiki Kaisha* v. *Flack.* (3) The charter was the Chamber of Shipping Welsh Coal Charter, 1896, under which, as adapted by the parties, the steamer was "to proceed to Delagoa Bay and there load in regular turn always afloat in the customary manner from the charterers in such dock as may be ordered by them on or before arrival. . . . ." There being no dock in Delagoa Bay, it was the opinion of Scrutton and Atkin L.JJ., agreeing with McCardie J. in the Court below, that the words "in such dock as may be ordered by them on or before arrival" should be rejected altogether. This at once made the decision in *Leonis Steamship Co.* v. *Rank* (1) applicable and, "from the time when the vessel was in the usual place where ships lie, and, being unloaded of her cargo and ballast, had given a valid notice," her lay time would run without regard to the fact that, owing to congestion in the port, a long time elapsed between her arrival in that place and the earliest possible time, when she would get to a place, where she could load cargo. The charter contained the clause now under discussion,

(1) [1908] 1 K. B. 499. (2) [1909] P. 27.
(3) 10 Ll. L. Rep. 83, 635.

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and McCardie J. stated its effect (p. 83) as making the days begin "when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds and ready to load." Scrutton L.J. said that her lay time ran from her arrival as above, and Atkin L.J. says "she is an arrived ship when she arrives at that part of Delagoa Bay where ships usually do lie within the meaning of the case of *Leonis Steamship Co.* v. *Rank* (1), and when she is, having arrived at that spot, entitled to give notice of readiness, though she may not in fact have given that notice." This really was a decision. The words "in regular turn" were before the Court and, whether they were made the subject of special argument or not, the decision of the Court covered them. Of course, it is open to your Lordships to hold that, if these words had been more fully considered, the result would have been different. The case is not binding here, but I do not think the Lords Justices overlooked any point proper for their consideration, and the weight of their opinion on facts and words, which are so closely like those before us, is most impressive to me.

On the other hand I venture to think that *Miguel de Larrinaga Steamship Co.* v. *Flack* (2) is not a case which raised the present point for decision at all, nor is it in any way conclusive now. The ship was chartered to load in a dock as ordered, but there were no docks. The contract had thus to be departed from in limine. Roche J., with the parties' consent, held that the contract applicable was an obligation to go to a pier and there in turn load as customary. How this was got at, I do not know. It was, apparently, by agreement. At any rate it was not the point in the case. The learned judge then dealt with the wording of the cancelling option, which the charterers claimed to exercise—namely, that the option was exercisable, if she was not "ready in loading dock as ordered" upon a certain date. His conclusion was twofold. The ship was not an arrived ship, so as to be entitled to demurrage, because she did not get to the pier, there to load in turn, neither party having asked him

(1) [1908] 1 K. B. 499. (2) 20 Ll. L. Rep. 268.

to say otherwise, but he held that she was an arrived ship when in the port, so as to defeat the exercise of the option to cancel. His expression of opinion is that, if a ship is not arrived till she is at the pier in turn to load, stoppages dependent on her being ready to load there do not affect the right, in view of the fact that she never got to the pier at all. So far, I cannot see that the learned judge decided anything relevant on the present occasion. If he is correctly reported, he said that there were strong grounds for saying that the time for giving notice of readiness, so as to start the laying time, did not arise till the ship was ready in turn ; but it was an observation quite indecisive and not material to any point dealt with by him. I have the highest regard for that learned judge's lightest opinion, but not knowing on what this opinion is based, I can make no use of it.

My Lords, I do not appreciate the special efficacy supposed to belong to the actual words " in regular turn." The use of the coaling appliance on the one hand, which art. 24 prescribes, and on the other the length of the working day, which custom fixes, also involve time and indirectly affect the rate of 1000 tons per day. Again the same question would arise under the words " as customary," if, say, work was not done on Saints' days, Saints' days not being regarded as local holidays, or if the custom of the stevedores in the port was not to work on the union's business meeting days. On such a dies non lay days could not " commence " any more than on a day when the ship was not in berth in turn. Does the same reasoning apply ? Again, if the local customs forbade the loading of coal during rain, owing to the risk of heating, the loading could not commence till the ship was in berth, in turn, and in fine weather. How far does this sort of inroad on *Leonis Steamship Co.* v. *Rank* (1) go ? I could put other similar examples, till the charter would be turned into a " reasonable time " charter instead of a " fixed days " charter to an alarming extent. As it appears to me, the argument involves that the words " subject to the regulations " stand on the same footing and have the same

(1) [1908] 1 K. B. 499.

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effect as "in regular turn," and for this reason. Clearly she cannot load except in berth, but that is got out of the regulations, not out of the words "in regular turn." The latter words would be satisfied, when she was lying in the bay next in turn to go to the berth, as soon as the ship, then loading in the berth, should complete her loading and haul off. It follows that she might be "in regular turn" and yet, at that moment and for some time to come, be unable to load. If ability to load is the test of the commencement of lay days or of the right to give an effective notice of readiness, then not only "in regular turn" but "subject to the regulations and as customary" all may (and do) "refer to the time and not only to the mode of loading."

My Lords, it is one of the commonest incidents in a voyage charter, that the ship is chartered to go to a named dock, the property of undertakers, in which there are a number of berths fitted with coal tips, special cranes, or other loading machinery. A ship may be able to get admission to the dock, and then be obliged to lie moored at buoys for days, waiting her turn to get under the tip and load. How does this differ from a charter to a port, there to load, the regulations of the port requiring a tip to be used, for which regular turn is to be taken? It may be that the words "in regular turn" have not been used, but everybody with practical knowledge is aware, that in nine out of ten such cases there is a regular turn, which must be followed, though it is only implied, for the alternative of a scramble — "first come first served"—is impracticable. Such cases are *Davies* v. *McVeagh* (1), as explained in *Nelson* v. *Dahl* (2) and in *Tharsis Sulphur and Copper Co.* v. *Morel* (3), per Bowen L.J., and *Thorman* v. *Dowgate Steamship Co.* (4)

I will refer to another authority in which, if the words in regular turn are not employed, a "custom as to turn" was the point in issue. In *Shamrock Steamship Co.* v. *Storey & Co.* (5), where a charter stipulated that loading time was to be on the

(1) (1879) 4 Ex. D. 265.
(2) 12 Ch. D. 568.
(3) [1891] 2 Q. B. 647, 651.
(4) [1910] 1 K. B. 410; 15 Com. Cas. 67.
(5) (1898) 4 Com. Cas. 80.

terms of a colliery guarantee, Bigham J. referred to the further words of the charter—namely, that the vessel was to load "in the usual manner according to the custom of the place"—and said: "The usual manner . . . . is to take it from the coal tip . . . . and this the vessel cannot do till she is under the tip. . . . . The charterparty further says that the ship is to load her cargo from such colliery or collieries as the charterers may direct, which means that she shall load at the tips of such collieries. Then the time for loading is to be '36 running hours,' which is about the length of time which would be required for loading after the vessel is once under the tips. These provisions in the charterparty, and particularly the last provision as to the 36 hours, when read with the reference to the manner of loading and to the custom as to turn, seem to me to show that the time for loading is not to begin until the vessel is under the tip."

My Lords, I think this is in substance the same reasoning as that which has been used in the present case, to the effect that provisions as to the mode of loading and the allowance of lay days must be read together, so as to allow the former to control the latter. In the Court of Appeal (1), however, when the judgment was affirmed on another ground, Lord Russell of Killowen C.J. (A. L. Smith and Vaughan Williams L.JJ. concurring) says this: "Bigham J. . . . . also stated that in his opinion, apart from the colliery guarantee altogether, he would have arrived at the same conclusion . . . . if this colliery clause had not been in the charterparty. . . . . I desire to guard myself to this extent, that if it were necessary to consider that view of the case I should certainly require to have it further discussed before I should be prepared to accept the view of the learned judge."

Some years afterwards an opportunity for such further discussion presented itself in *Thorman* v. *Dowgate Steamship Co.* (2), when the above opinion of Bigham J. was again advanced in a similar charterparty and was not followed. The words there were "to proceed to Hull (Alexandra Dock) . . . . and there take on board as tendered in the usual manner,

(1) (1899) 5 Com. Cas. 21, 23. (2) [1910] 1 K. B. 410; 15 Com. Cas. 67.

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according to the custom of the place, as per colliery guarantee . . . . a full and complete cargo . . . . to be loaded in 120 hours on conditions of usual colliery guarantee." It was held at the trial that the laying hours began to run when the ship was in the Alexandra Dock, unballasted and ready, though she was not yet in a loading berth and could not get into one, because owing to the congestion of the shipping she had to wait her turn, but the case was not taken to the Court of Appeal and, as far as I know, this mode of construing such words has not been urged again until the present case was heard, unless indeed *Love & Stewart* v. *Rowtor Steamship Co.* (1) is such a case, where at any rate it was not well received.

My Lords, I would respectfully ask whether these decisions, after standing so long, are now to be considered as overruled by your Lordships in this case? No doubt it may be said that these cases were not wrongly decided, for the point was not taken as to the efficacy of the words "in regular turn" in fixing the time of loading. Now, however, that it has been taken, it seems to me that if the judgment of the Court of Appeal is right, these decisions can be followed no longer. Again, take such a case as *Pyman* v. *Dreyfus* (2), where a ship in the outer harbour at Odessa was held to be an arrived ship, so that her laying time began to count then and there, notwithstanding that she had still to await her regular turn before going to a loading quay, where alone she could take cargo. Can this be relied on in future? Mathew J. says, in *Murphy* v. *Coffin & Co.* (3), that the test of an arrived ship is what is her place of destination, but, if the decision of the Court of Appeal is to be affirmed, this will no longer do; it will have to be where is her loading berth within that place of destination and what is her regular turn for it? And how is *Leonis Steamship Co.* v. *Rank* (4) itself affected? If the principle of construction is to prevail that, till this ship was in berth in turn, she was not arrived, but that from that point her lay days began to run and then ran continuously (subject to excepted days), I think that,

(1) [1916] 2 A. C. 527.
(2) 24 Q. B. D. 152.
(3) (1883) 12 Q. B. D. 87.
(4) [1908] 1 K. B. 499.

logically, this negatives the correctness of *Leonis Steamship Co.* v. *Rank* (1), though the respondents did not challenge it. Scrutton L.J. states what that case decided—namely, "that in the case where the charter was to go to a berth, though the charterer had the implied right to select his berth, the time began, as far as the shipowner was concerned, when the ship was in a part of the port, where ships waiting for loading would lie, although she had not got the berth where she could load." Why, then, do the days not run from the time when this ship gave notice, being in a part of the port where ships waiting for loading (as the *Hinckley* was) would lie? Only because of the words "in regular turn" in this clause. It is true that the charter in *Leonis Steamship Co.* v. *Rank* (2), which is fully set out in 13 Com. Cas., did not mention "customary manner" or "port regulations" or "regular turn," but what was it that caused the delay, for which the ship recovered demurrage? It was that she lay in the river off the wharf unable to get there, because there were forty-six other vessels in turn before her. As regular turn existed in fact and was the cause of the difficulty, I find it hard to say that the point did not arise, or that to add a fourth condition to those enumerated by Kennedy L.J.—namely, "the arrival of the turn"—is anything but a reversal of his decision. The whole point of it was that the ship was arrived and that her lay days began, the non-arrival of the turn notwithstanding.

The judgments delivered in the Court of Appeal show that, in arriving at the construction adopted, great importance was placed on the supposed connection between the commencement of the lay days and the commencement of the loading. The word to be implied before "commencing" was to be the word "loading." The supposed reconciliation between the notice of readiness to load and the provision for loading in regular turn was that the ship's right to be loaded was assumed to be coincident and simultaneous with her duty to play her part in the prescribed manner of loading. Scrutton L.J., for example, says, "to make a provision that

(1) [1908] 1 K. B. 499. (2) [1908] 1 K. B. 499; 13 Com. Cas. 136.

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a ship shall load at the rate of 1000 tons a day before she can possibly load at that rate looks as if there was something wrong somewhere."

My Lords, it seems to me that such reasoning loses sight of the real nature of lay days, and also of the obligations of the respective parties, the shipowner and the charterer. Lay days ascertained by a rate do not differ in their character from lay days fixed by a number: *Love & Stewart* v. *Rowtor Steamship Co.* (1) The rate affords a calculus for getting at a number, but the rate of loading is not measured or fixed by any process of loading; it is fixed by dividing one figure—namely, the fixed rate—into another—namely, the weight loaded, quite irrespective of the time, place or mode of such loading. Again, a contract to load in regular turn at the rate of 1000 tons a day is not a contract to commence loading when the turn arrives, and then to continue at the stipulated speed. A charterer does not break his contract by not beginning to load on the first lay day or by not continuing to load on each or any subsequent lay day. He is not in default, if he falls short of the rate, and so has to load during the demurrage days. If, knowing that the agreed rate is fixed favourably to himself and that with ten days to go he can load in three, he does nothing for seven, hoping to force the captain to pay him despatch money, he has not broken his contract. Very often this is a by-way of making money out of the charter, and this is the reason why, as in this case, there is a clause providing for despatch money for all time saved. Lay days and laying time are days allowed for loading without further payment than the freight, and, if there is an agreement for further days on demurrage at an agreed rate, those further days are allowed at that price. No question of damages arises till the ship is further "detained," and such detention is only a breach in the sense of founding a claim for proved unliquidated damages. The ship has still to wait and load, until the delay either evidences repudiation by the charterer or commercial frustration of the contract. Till then, inaction by the charterer is not a breach of his

(1) [1916] 2 A. C. 527.

contract to load, but only a breach of his undertaking that the ship shall be set at liberty after a certain time; and, at the price of paying damages for detention, the charterer can load or not, as suits him best. Hence, if lay days commence before loading can commence, this merely means that the charterer has not the best of the bargain.

The obligation to load of course arises when the contract is signed, not when the ship gets her turn; that merely enables performance of the loading obligation to commence. The commencement of lay days is stipulated as part of a different obligation; it is the contractual adjustment of the incidence of risks of delay. The parties contract not that the ship must be loaded during those days and not otherwise, but, as Lord Dunedin says in *Alexander* v. *Aktieselskabet Dampskibet Hansa* (1): The charterer guarantees discharge in so many days. This is an absolute obligation, subject to express exceptions. If this is not fulfilled, a money payment has to be made. Accordingly the words beginning "The cargo to be loaded" and the words "at the rate of 1000 tons per day" are in their nature independent stipulations. The ship undertakes to submit to the usual rules and practices; the charterer backs himself to set her at liberty within so many free days and so many more to be paid for. Clearly these engagements would be independent if there were a full stop after "as customary" and then a new sentence began with the one word "loading." Does it really make all the difference (or any) that the words are elliptical and the punctuation is only a comma? A deed would be engrossed in one long sentence without punctuation, and this would not affect the intrinsic nature of its several provisions; may not a clause in a charter be so construed, even though it lacks the literary grace of short sentences, or the principle of one clause, one thing? As to the substance of this endeavour to connect readiness to load on one side with readiness on the other, I think that *Budgett & Co.* v. *Binnington & Co.* (2) is a good illustration of the independence of these stipulations. According to the customary mode of discharge, both ship and

(1) [1920] A. C. 88, 96. (2) (1890) 25 Q. B. D. 320; [1891] 1 Q. B. 35.

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merchant had to employ stevedores, the former to deliver cargo into the merchant's craft, the latter to receive it and stow it therein. All the men on both sides struck. Although the operation was a joint operation and the charterer could do nothing, if the ship did not do her part, the consequent delay was held to be entirely at his risk, the lay days being fixed, and the reason given is that the ability of the ship to discharge had not been made a condition precedent to the merchant's undertaking, that the whole discharge should be completed in the fixed time or payment made.

My Lords, I turn now to the purely grammatical side of the matter. The subject of the sentence is the "cargo" to be loaded, and then follow three quite distinct sets of words expressing respectively (*a*) the manner, (*b*) the time and (*c*) the beginning, as I venture to think, of that time. The words "commencing when" are obviously apt to express the beginning of a period of time. The next preceding words —"per day" with their dependent parenthesis—all refer to time, and to imply from the previous words either "days" or "time," before "commencing," so far from doing violence to sense or language, seems to be the only way of making business sense and of presenting an ordinary example of business expressions. After all one does not look for style in a charter.

On the other hand, the implication of the word "loading" before "commencing" has two difficulties, first, that there is no such word in the sentence, and next, that other words, which are in the sentence, have to be reinserted elsewhere—namely, the words "in regular turn" immediately after "ready to load." It would have been quite easy to add these words over again or to have inserted "in turn" after "ready." The parties did so twice over in the later paragraphs of this clause, once when dealing with cancellation of the obligation to accept cargo, but in the clause in question, when dealing with the supply of cargo, they deliberately forebore to do so. It is significant that this was not done, for "ready to load" has both in law and in plain English one clear and accustomed meaning only, that is ready in herself,

ready as far as she is concerned, as a ship is ready for action, though not yet within range of her enemy. The authorities on this point are numerous, explicit and uniform, and give the phrase a meaning which it is difficult indeed to vary merely by argument from a context: see, for example, *Northfield Steamship Co.* v. *Compagnie l'Union des Gaz* (1), per Farwell L.J.; *Alexander* v. *Aktieselskabet Dampskibet Hansa* (2), per Lord Finlay and per Lord Shaw. I think Lord Dunedin's language (on p. 95 of this last case) is specially apposite: "It is, I think, impossible to draw a distinction between any of the various kinds of agencies which are not within the control of the ship, any one of which may delay the loading or unloading. If, therefore, the clause in question were given the most expanded meaning" (i.e., ready and with stevedores willing to work), "it would certainly reverse the ordinary legal result of the stipulation as to lay-days. . . . . If that was meant it would have to be effected by unambiguous words."

The whole reasoning of their Lordships' judgments in the case now cited shows that the earlier decisions were approved, e.g., that a ship may be "ready" for the purpose of giving notice of readiness to receive cargo, though she has not yet lined her hold as customary for a wheat cargo about to be shipped: *Vaughan* v. *Campbell & Co.* (3); *Grampian Steamship Co.* v. *Carver & Co.* (4); and see *Armement Adolf Deppe* v. *Robinson & Co.* (5), per Swinfen Eady L.J.; or although she was not in a loading berth: *Hick* v. *Tweedy.* (6) The ship's readiness is affected by her own disabilities: *White* v. "*Winchester*" *Steamship Co.* (7), but these notices are meant to be given on arrival; they must refer to the facts then existing as to the ship, and cannot be qualified by uncertainties as to places, to which she is only to go when she has accomplished her voyage to her loading port, and as to the state of things then existing there, which should be known to the charterer, who has bidden her come there to load his

(1) [1912] 1 K. B. 434, 440.
(2) [1920] A. C. 88, 95, 98.
(3) (1885) 2 Times L. R. 33.
(4) (1893) 9 Times L. R. 210.
(5) [1917] 2 K. B. 204, 208.
(6) 63 L. T. 765.
(7) (1886) 23 S. L. R. 342, 347; 13 R. 524.

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cargo, but cannot readily be known by the captain newly arrived.

Now suppose the sub-clause is not so read, the sentence will then have to be rearranged. "Loading commencing" when the ship is ready in turn, even if that is deemed to mean, what in itself it does not say, ready in berth in turn, will not be enough, for even with a ship ready in berth in turn, loading might not commence but might be further postponed, if any custom or regulation forbade it to commence forthwith. If the full loading obligation (lay days apart) is to be prefixed to the word "commencing" something like this would be required: "3. The loading of the cargo to commence when written notice is given, that the steamer being," etc., ". . . . is in berth in turn ready to load, subject to the regulations and customs of the port, and there to continue loading, always in accordance therewith, at the rate of 1000 tons per day till completion." This would be an heroic effect of conjectural emendation. It would be not construction but reconstruction.

Next, what about the syntax? "Commencing" is a present participle, which qualifies some missing substantive. The lacuna must be supplied from some antecedent substantive or, alternatively, this participle must be deemed to relate to some actual antecedent, normally the nearest. Throughout the previous five lines of print all the substantives relate to time, and that time is loading time. They are "day," "time," "holidays," and "days" of the week. If we pass over these to reach something further back, the only available substantive remaining is "cargo," but commencing cargo will not do; cargo is not commenced. Once more new words have to be foisted upon the parties. It has to be "loading of cargo commencing." I know that this is not very difficult, since the words are "cargo to be loaded," but neither is it difficult to say "lay time commencing" instead of "loading commencing," and I can see no reason for adopting the former, except to make the interpretation square with some presupposed principle of chartering business, that the obligation to go and load (which is not the real point—the real point is the commencement of lay days) must coincide

with the obligation to put cargo on board. With regard to all implications of new terms, when the existing words are in themselves clear, I venture once more to invoke *The Moorcock*. (1) It should only be done if it is necessary to give effect to the clear intention of the parties. We are not, however, to presume that they intended lay days and loading to commence together. In scores of charters the matter is arranged otherwise. It is a question of money, and they have made their own bargain. I submit that to read the clause as " laying time commencing " gets rid of all need for reconstructions and additions; it makes any inroads on " berth " or " port " charters, " fixed lay days " or " reasonable time " quite needless. *Leonis Steamship Co.* v. *Rank* (2) will stand over to be affirmed or overruled some other time, and perhaps that time may never come.

My Lords, I apologize for so tedious an exposition of cases, all no doubt already well known to and maturely considered by your Lordships, but the citation of authority at the Bar was parsimonious, and I have felt it my duty to submit to your Lordships' better judgment these cases, with such observations on them as seemed to me to be material.

My Lords, I am asked to add that the opinion I have just read enjoys the agreement of my noble and learned friend Viscount Haldane.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, May 7, 1926.

Solicitors for the appellants : *Thomas Cooper & Co.*
Solicitors for the respondents : *William A. Crump & Son.*

(1) (1889) 14 P. D. 64. (2) [1908] 1 K. B. 499.

[HOUSE OF LORDS.]

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FROME UNITED BREWERIES COMPANY, LIMITED, AND ANOTHER . . } APPELLANTS;

AND

KEEPERS OF THE PEACE AND JUSTICES FOR COUNTY BOROUGH OF BATH . . . . . } RESPONDENTS.

Licensing—Justices—Bias—Renewal of Licence—Reference to Compensation Authority—Licensing Justices instructing Solicitor to oppose Renewal—Right of such Justices to sit on Compensation Tribunal—Certiorari—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 19.

On an application to the licensing justices of a county borough for the renewal of an old on-licence the justices referred the matter to the compensation authority of the borough under s. 19 of the Licensing (Consolidation) Act, 1910, and at a further meeting they resolved that a solicitor should be instructed to appear before the compensation authority and oppose the renewal on their behalf. The solicitor duly appeared and opposed and the compensation authority refused the renewal, subject to payment of compensation. Three of the justices who sat and voted as members of the compensation authority had been parties to the resolution of the licensing justices authorizing a solicitor to appear on their behalf:—

Held, that the three justices were disqualified from sitting on the compensation tribunal on the ground of bias, and that the decision of the tribunal must be set aside.

Reg. v. *London County Council. Ex parte Akkersdyk* [1892] 1 Q. B. 190 followed.

Rex v. *Cheshire Justices* [1906] 1 K. B. 362 distinguished.

Order of the Court of Appeal [1925] 1 K. B. 685 reversed.

APPEAL from an order of the Court of Appeal (1) affirming an order of the Divisional Court.

The appellants were the owners and the licensee of a fully licensed hotel known as the Seven Dials Hotel in the county borough of Bath.

The respondents were the justices of the county borough of Bath, acting as the compensation authority for the borough.

The question of the renewal of the licence, which was

* *Present:* VISCOUNT CAVE L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD SUMNER, and LORD CARSON.

(1) [1925] 1 K. B. 685.

an old on-licence, had been referred by the licensing justices to the respondents, who refused the renewal, subject to compensation.

On July 15, 1924, the appellants obtained an order nisi against the respondents for the removal of the order refusing the renewal of the licence to the King's Bench Division for the purpose of having it quashed on the ground that some of the justices who took part in the decision were disqualified by interest from adjudicating in their own cause.

On October 28, 1924, the Divisional Court (Lord Hewart C.J., Shearman and Salter JJ.) discharged the order of July 15, 1924, and on February 19, 1925, the Court of Appeal by a majority (Bankes and Scrutton L.JJ. ; Atkin L.J. dissenting) affirmed the order of the Divisional Court.

The facts are fully stated in the report of the case before the Court of Appeal and are summarized in the headnote.

1926. March 25. *Macmorran K.C.* and *Croom-Johnson* (with them *Graham Dixon*) for the appellants. It is a general rule of English law that a man cannot act at the same time as accuser and judge, and there is nothing in the Licensing (Consolidation) Act, 1910, which exempts licensing justices from that rule. The compensation authority, when determining whether a licence shall be renewed, is acting in a judicial capacity : *Rex* v. *Southampton Licensing Justices* (1) ; *Dartford Brewery Co.* v. *County of London Quarter Sessions* (2) ; *Colchester Brewing Co.* v. *Tendring Licensing Justices.* (3) If there is a real likelihood of bias on the part of any member of that tribunal the proceedings of the whole body will be vitiated : *Rex* v. *Halifax Justices* (4) ; *Rex* v. *Sunderland Justices* (5) ; *Reg.* v. *London County Council. Ex parte Akkersdyk.* (6) The authority of the last mentioned case is expressly recognized by Lord Esher in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (7), which at first sight might appear to be inconsistent with

(1) [1906] 1 K. B. 446, 449.
(2) [1906] 1 K. B. 695, 701.
(3) [1916] 2 K. B. 126, 132.
(4) (1912) 76 J. P. 233, 234.
(5) [1901] 2 K. B. 357.
(6) [1892] 1 Q. B. 190.
(7) [1892] 1 Q. B. 431, 445.

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it. And see *Law* v. *Chartered Institute of Patent Agents* (1); *Reg.* v. *Lee.* (2) *Rex* v. *Cheshire Justices* (3) does not touch the question at issue in this case. It is an authority for the proposition that licensing justices who have taken part in deciding that a licence should be referred are not thereby disqualified from sitting as members of the compensation authority when deciding upon the renewal of the licence. But here the licensing justices to whom objection is taken have prejudged the case by retaining a solicitor to oppose the renewal: *Reg.* v. *Fraser.* (4) [*Leeds Corporation* v. *Ryder* (5) was also referred to.]

Holman Gregory K.C. and *Wethered* for the respondents. Instructing a solicitor to put the case of the licensing justices before the compensation authority is no evidence of bias or of any likelihood of bias. Members of the licensing committee for the county borough of Bath were entitled to sit and adjudicate as members of the compensation authority for the county borough, notwithstanding that they were parties to referring the consideration of the renewal of the licence to the compensation authority, and they were entitled to be represented by a solicitor at the principal meeting of the authority when the renewal of the licence was considered. Licensing (Consolidation) Act, 1910, s. 19, sub-s. 2; s. 21, sub-s. 5. The justices, when sitting as the compensation authority under the statute, are not a Court, and sit in an administrative and not in a judicial capacity: *Rex* v. *Howard* (6); *Boulter* v. *Kent Justices.* (7) Before 1904 the licensing justices had an absolute power to refuse the renewal of a licence on the ground of redundancy as on other grounds, and the Act of 1904, which created the compensation authority, must have been passed with full knowledge of the decision in *Howard's* case. (6) The compensation authority is a statutory creation, and has no authority apart from statute, and the Legislature did not contemplate that it should be a perfectly

(1) [1919] 2 Ch. 276, 289.
(2) (1882) 9 Q. B. D. 394.
(3) [1906] 1 K. B. 362, 368, 370.
(4) (1893) 9 Times L. R. 613.
(5) [1907] A. C. 420.
(6) [1902] 2 K. B. 363, 378.
(7) [1897] A. C. 556.

impartial tribunal. The procedure relating to the renewal of licences is of an exceptional character arising out of the special provisions of the Licensing Acts and Rules. [They also referred to *Ecclesiastical Commissioners* v. *Page*. (1)]

Macmorran K.C. replied.

The House took time for consideration.

1926. May 7. VISCOUNT CAVE L.C. My Lords, Bath is a county borough, and accordingly the licensing justices of the borough for the purposes of the Licensing (Consolidation) Act, 1910, consist of a borough licensing committee appointed by the borough justices, and the compensation authority consists of the whole body of borough justices. The licensing justices held a meeting on February 22, 1924, and, acting under s. 19 of the Act of 1910, referred to the compensation authority the question of the renewal of certain old on-licences, including the licence of the Seven Dials Hotel; and in accordance with the Act they made a report to the compensation authority, in which they stated the special circumstances connected with each of the referred houses. On May 9, 1924, the licensing justices met and passed the following resolution: "That the clerk be instructed to write Mr. A. E. Withy asking whether he will be prepared to act for the licensing justices in opposing the renewals of licences referred to the compensation authority, and in the event of his agreeing to act, to instruct him."

The solicitor named accepted the instructions, and at the principal meeting of the compensation authority, which was held on June 13, 1924, he duly appeared for the licensing justices and opposed the renewal of the licence of the Seven Dials, which was refused. The justices present at the principal meeting when this decision was reached, included three justices who had been present at the meeting of the licensing justices on May 9 when the instructions to oppose the licence were given, as well as a fourth justice who had been present at their meeting on February 22 when the

(1) [1911] 2 K. B. 946.

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decision to refer the licence was taken. At the hearing on June 13 objection was taken to these justices sitting and adjudicating, but the objection was overruled.

On July 15, 1924, the King's Bench Division granted a rule nisi for a writ of certiorari to remove the proceedings of the compensation authority into that Court on the ground that the four justices above referred to were disqualified by interest from adjudicating in the matter; but on argument the rule was discharged by a Divisional Court, and their decision was confirmed by the Court of Appeal, Atkin L.J. dissenting. The owners and licensee of the Seven Dials have now appealed to this House.

My Lords, if there is one principle which forms an integral part of the English law, it is that every member of a body engaged in a judicial proceeding must be able to act judicially; and it has been held over and over again that, if a member of such a body is subject to a bias (whether financial or other) in favour of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal. This rule has been asserted, not only in the case of Courts of justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called Courts, have to act as judges of the rights of others. Thus in *Reg.* v. *London County Council. Ex parte Akkersdyk* (1), where a committee of the London County Council had recommended that a certain music and dancing licence should not be granted, and some members of the committee had instructed counsel to represent them before the county council and to oppose the application for the licence, it was held that the presence at the hearing of those members of the committee who had instructed counsel to oppose the application vitiated the proceedings, and a rule for a mandamus to hear and determine the application according to law was made absolute. In an Irish case, *Reg.* (*Monaghan County Council*) v. *Local Government Board* (2), where the authority concerned was the Local Government Board of Ireland, a

(1) [1892] 1 Q. B. 190. (2) (1900) 34 I. L. T. 196.

similar decision was reached. Instances of the application of the like rule to licensing justices in England are *Rex* v. *Sunderland Justices* (1) and *Colchester Brewing Co.* v. *Tendring Licensing Justices.* (2)

From the above rule it necessarily follows that a member of such a body as I have described cannot be both a party and a judge in the same dispute, and that if he has made himself a party he cannot sit or act as a judge, and if he does so the decision of the whole body will be vitiated. Thus, in *Reg.* v. *Lee* (3), where a member of the sanitary committee of a town council who had taken part in directing a prosecution sat and adjudicated upon the charge, the conviction was quashed; and similar decisions were given in *Leeson* v. *General Council of Medical Education* (4), and in the above cited case of *Ex parte Akkersdyk.* (5)

My Lords, it appears to me that these considerations are decisive of the present case. The Bath justices, when sitting as the compensation authority under the Licensing Act of 1910, may not be a Court; but they are performing a judicial act, for it is their duty after hearing evidence and listening to arguments to pronounce a decision which may vitally affect the interests of the persons appearing before them. This being so, the justices who are members of the authority are bound to act judicially and not to sit if they are subject to that which in *Reg.* v. *Rand* (6) was referred to by Blackburn J. as a "real likelihood of bias"; and I cannot doubt that in the case of those three justices who took part in instructing a solicitor to oppose the renewal of the licence of the Seven Dials, such a real likelihood of bias existed. It is said that the justices in question did not themselves instruct the solicitor, but only directed their clerk to do so; but this appears to me to be an unreal distinction. All the three justices passed and signed the resolution directing their clerk to instruct Mr. Withy to oppose the renewal of the licence, and he did accordingly as their representative appear before the compensation authority and oppose the renewal; and

(1) [1901] 2 K. B. 357.
(2) [1916] 2 K. B. 126.
(3) 9 Q. B. D. 394.
(4) (1889) 43 Ch. D. 366.
(5) [1892] 1 Q. B. 190.
(6) (1866) L. R. 1 Q. B. 230.

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I fail to see how under these conditions the justices who had instructed him and whom he represented could be free from all suspicion of bias when sitting to adjudicate upon his argument.

My Lords, the Court of Appeal appears to have felt the force of these considerations, and Bankes L.J. said in terms that, apart from the peculiar constitution of the compensation authority and the statutory provisions as to its powers, he would have had no hesitation in holding that the facts of the present case did disclose a real likelihood of bias; but nevertheless the majority of the Court held that the ordinary rule was excluded by the special terms of the statute. With the greatest respect for the opinion of the learned Lords Justices who took that view, I am unable to agree with it. It may be that the statute contemplates that members of the renewal authority—in this case the borough licensing committee—may sit as members of the compensation authority. Certainly there is no provision to the contrary; and s. 6, sub-s. 5, expressly provides that the justices of a non-county borough may appoint one of their number to act with reference to the renewal of a licence in the borough as a member of the county compensation authority. Possibly it was considered that the question which the licensing justices have to decide—namely, whether the renewal of certain licences shall be referred for consideration—is different from the question which has to be determined by the compensation authority—namely, whether the licences shall be renewed; and that a magistrate who has joined in referring a licence may nevertheless, when acting judicially on the evidence brought before the compensation authority, come to the conclusion that the same licence ought not to be refused. But, assuming this to be so, it by no means follows that a justice who is actively opposing the renewal of a licence can adjudicate upon the question of renewal. No doubt the statute contemplates the possibility of the licensing justices appearing before the compensation authority and taking part in the argument; for it is provided by s. 19, sub-s. 2, that the compensation authority shall give any person appearing to them to be interested in the question of the renewal of a

licence, "including the licensing justices," an opportunity of being heard. But the statute nowhere says that justices who elect to appear as opponents of the renewal and take active steps (such as instructing a solicitor) to make their opposition effective, may nevertheless act as judges in the dispute; and in the absence of a clear provision to that effect I think that the ordinary rule, that no one can be both party and judge in the same cause, holds good.

For these reasons I am of opinion that in the circumstances proved in this case the refusal to renew the licence of the Seven Dials cannot stand, and accordingly that the orders of the Court of Appeal and of the Divisional Court should be set aside, and the order nisi made absolute with costs here and below.

I am asked to say that my noble and learned friend Lord Shaw concurs in the judgment which I have delivered.

LORD ATKINSON. My Lords, the relevant facts have been stated already. I shall only restate such of them as are needed to make what I am about to say intelligible. The appeal raises an important question—namely, whether the licensing justices of a county borough, like the county borough of Bath, who, on consideration by them, in accordance with the provisions of the Licensing (Consolidation) Act of 1910, of an application for the renewal of an old on-licence, are of opinion that this application requires consideration on grounds other than those on which the renewal of such a licence can be refused by themselves, and have referred the matter to the compensation authority with their report, are properly entitled to act as members of the compensation authority, and join in determining whether the licence so referred shall be refused or granted, notwithstanding that they have theretofore instructed a solicitor to appear on their behalf before the body of which they themselves have in fact become members, and oppose the renewal of that licence.

In this case an application was, on February 8, 1924, made by the appellants to the annual general licensing meeting of the licensing justices for the city of Bath for a renewal of an old on-licence for a hotel named the Seven

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Dials Hotel, of which the appellant company are the owners and the appellant Abel Cornelius Ashman is the licensee. At this meeting the question of the renewal of the licence of this hotel was adjourned for consideration, on the ground of the alleged redundancy of the licensed premises in the borough, to an adjourned meeting of the licensing justices to be held on February 22, 1924. At this adjourned meeting the licensing justices unanimously decided to refer the consideration of the renewal of the licence to the compensation authority of the county borough as provided by s. 19 of the aforesaid Act of 1910. The licensing justices present on that occasion who took part in that decision were the following six gentlemen—namely, Lieut.-Colonel Egbert Lewis (Chairman), Sydney William Bush, James Henry Colmer, Charles Cowley, Edward Shewring, and Frederick William Spear, and one lady, Mrs. Selina Long. The licensing justices, in pursuance of sub-s. 1 of the aforesaid s. 19, duly prepared their report and furnished it to the compensation authority touching the licences so referred. It was signed on their behalf on April 30, 1924, by E. Newton Fuller, described as clerk to the renewal authority. I think it well to quote at length the portion of it which refers to the Seven Dials Hotel, for which Abel Cornelius Ashman had held a licence for the ten immediately preceding years :—

"At the general annual licensing meeting holden at the Guildhall, Bath, on the 8th day of February, 1924, and by adjournment on the 22nd day of February, 1924, for the above-named licensing district. We being the renewal authority for the said district decided to refer to you under s. 19 of the Licensing (Consolidation) Act, 1910, the question of the renewal of the licences held in respect of the premises specified below :—

Name and Situation of Premises.	Nature of Licence.	Licensee.	Registered Owners.
. . . . .	. . . . .	. . . . .	. . . . .
Seven Dials', Westgate Place, Bath.	Publican's Licence.	Abel Cornelius Ashman.	Frome United Breweries, Ltd., Frome.

"In connection with the question so referred we report that we are of opinion from the evidence laid before us that the licences of the houses mentioned above are not required, having regard to the number of licensed houses in the neighbourhood and the character and necessities of the neighbourhood in which the premises are respectively situated."

. . . . . .

"Seven Dials.—There are 9 other licensed houses within 200 yards, 7 of which are fully-licensed houses and the other 2 beer houses. One of the fully-licensed houses is a free house. Most of the other houses have better accommodation and the trade done at them is larger, as appears from the number of persons shown by the police to have entered during certain hours. This house is stated by the police to be difficult of supervision from a police point of view. There is a large yard at the rear to which other persons have a right of access. This yard has double gates and a door opens into it from the house. The licensee states that the yard provides stabling for 4 or 5 horses, one being accommodated there permanently, and that he provides food for horses occasionally, also that there is a shed in which motor-cycles are stored. The licensee also states that there are 8 bedrooms available for letting, but of these it has been ascertained that only 4 are furnished, 3 being occupied by the licensee and his family, and the fourth (which is very small) being used as a dressing room. The remaining 4, which are on the top floor and are in poor condition, are used as lumber rooms."

The words "licensing justices" in the preceding statement mean of course the Borough Licensing Committee: s. 2, sub-s. 3, and s. 3 of the Licensing Act.

I have set out in full this report, founded of course on sworn evidence, in order to show that it is so complete, so full and precise in all its details, that it is obvious no advocacy was needed to bring home its meaning, or the views of its authors, to the minds of the members of the compensation authority to whom it was addressed and who would have to consider it. Yet at a meeting of the licensing justices for the city of Bath, held on May 9, 1924, Lieut.-Colonel Lewis in the chair,

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Mr. E. A. Bagshawe, Mr. Bush, Mr. Colmer and Major Reilly being also present, a resolution was passed to the effect that their clerk be instructed to write Mr. A. E. Withy, solicitor, asking him whether he would be prepared to act for the licensing justices in opposing the renewals of licences referred to the compensation authority; and in the event of his agreeing to act, to instruct him. The clerk of the renewal authority carried out his instructions to the letter. He, by letter dated May 10, 1924, applied to Mr. Withy as he was directed. In this letter the two following paragraphs occur. "The compensation authority, at a meeting held yesterday, decided to proceed upon the report of the renewal authority, and I am instructed to ask whether you would be prepared to act for the licensing justices in opposing the renewals of the licences. I shall be much obliged if you will kindly let me know, and on hearing from you that you will act, I will send you copy of the renewal authority's report and any other particulars which you may require." Mr. Withy was not to be confined to arguing on the terms of this report, but was to receive all additional information that might be available, if he desired it, to oppose the renewal of the appellants' licence and thereby to support the decision of his clients.

When on June 13, 1924, the question touching the renewal of the appellants' licence came on for consideration in the Court House at Bath before the compensation authority, the proceedings took a shape resembling more than anything else a bitter legal dispute between the inflamed advocates of two hostile litigants. The appellants were represented by their solicitor, the licensing justices by Mr. Withy. The tribunal was composed of seven members. Four of these seven—namely, Lieut.-Colonel Lewis, Mr. Bagshawe, Mr. Bush and Major Reilly—were members of the renewal authority which had made the before mentioned report, and had retained Mr. Withy to oppose the renewal of the licences. Mr. Reginald Wansbrough, solicitor, appeared for the present appellants. On hearing Mr. Withy state that he appeared for the licensing justices to oppose the appellants' application

before the compensation authority for a renewal of the appellants' licence, he was asked by the appellants' solicitor if he appeared for all of them, to which he replied that he did. Thereupon Mr. Wansbrough protested vehemently against any of the members of the renewal authority sitting as members of the compensation authority to decide the case, in view of the fact that they were represented by their own solicitor, who had been instructed by them to oppose the renewal of the licence; and submitted to the tribunal that it was contrary to law that a member of that tribunal should sit to decide whether the contentions of his own retained solicitor were correct or not. The chairman then, Mr. Wansbrough states, said that the members of the renewal authority had not personally intervened, but that Mr. Withy had been instructed by their clerk.

Mr. Wansbrough further states that after hearing the arguments addressed to the compensation authority by the two solicitors, the seven justices, constituting the court, retired; that on their returning into court, the chairman announced that they had overruled the objection; that thereupon two of the seven members retired, leaving five members, who continued to sit and ultimately to decide the case. He (Wansbrough) states that he has ascertained that the members who gave the decision were Mr. Bagshawe (in the chair), Lieut.-Colonel Lewis, Mr. Bush, Mr. Spear and Mr. Hope, the first three of whom were members of the renewal authority.

Mr. Wansbrough, in his affidavit sworn on July 10, 1924, states that of the seven members of the compensation authority who decided this case, Mr. Bagshawe, Lieut.-Colonel Lewis, Mr. Bush, and Major Reilly were amongst the licensing justices who had referred the application of the appellants to the compensation authority for a renewal of the licence for his hotel. Messrs. Bagshawe, Bush, Colmer and Cowley in their affidavits make each the same two points. They admit that at the meeting on May 9 they supported the resolution that the clerk be instructed to obtain the services of Mr. A. E. Withy, because they considered it advisable

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that the licensing justices should be represented before the compensation authority. They each and all omit to say why they thought so, but they make the rather ridiculous point that they took no part in personally instructing Mr. Withy, that no communication, direct or indirect, touching the renewal of these licences passed between him and them. That may well be, but they all admit they were present at the meeting at which was passed the resolution requiring the clerk to ascertain if Mr. Withy would act for the licensing justices to oppose the renewals of the licences referred to the compensation authority, and in the event of his agreeing to do so to instruct him. Well, Mr. Withy did agree to act, and Mr. Fuller did instruct him, and he did appear before the compensation authority for them. Mr. Fuller has made a lengthy affidavit, in para. 6 of which he states that when he received Mr. Withy's reply that he would act for the licensing justices, he gave him instructions, as he had been ordered to do. He furnished him with a copy of the report of the licensing justices relating to the Seven Dials Hotel, and produced for his inspection the notes of the evidence taken by Mr. Fuller at the hearing on February 24, 1924, in reference to the Seven Dials Hotel, and requested him to obtain from the police any further particulars which he might require or desire. The licensing justices who were parties to the passing of the resolution above mentioned on May 9, 1924, constituted Mr. Fuller their agent to instruct Mr. Withy as their solicitor to act for them in the manner stated, and are as responsible for his action as if they had instructed him themselves directly. They also stated that the objection raised by the appellants' solicitor, as to their taking part in the proceedings, was overruled by the justices so sitting after considering the judgment of the Court in *Rex* v. *Cheshire Licensing Justices* (1), and that their subsequent decision to refuse the renewal of the appellants' licence was taken after fully considering the evidence and arguments addressed to them for and against the renewal of the appellants' licence. This last case is, however, on the facts quite distinguishable from the

(1) [1906] 1 K. B. 362, 364.

present. It arose in the borough of Hyde, which is not a county borough. Mr. Blackwell, a justice of the peace of that borough, was a licensing justice and also a member, appointed by the justices of Hyde, on the committee of quarter sessions. He took part in the proceedings of both committees dealing with the refusal to renew the licence for the Grapes Inn, Hyde, the renewal of which was refused. The feature which markedly and happily distinguished that case from the present case is this, that Mr. Blackwell had taken no part whatever in instructing counsel to appear for the justices of Hyde to oppose the application, and never had assumed the position of a litigant enforcing by his own advocate his own view and aims, in opposition to the advocate of the opposing litigant, and naturally desiring, as hostile litigants usually do, that his own contention might succeed, and his opponent's fail. But that is precisely what each of the justices who acted as members in this case did. That is the position they each assumed. Mr. Danckwerts K.C., who, in the above mentioned case, appeared for the justices, in his opening argument, said: "No doubt on general principles justices who instruct counsel to appear for them to oppose a renewal would be debarred from adjudicating on the question, but in this case Mr. Blackwell took no part in instructing counsel." There is nothing to distinguish counsel from solicitor in relation to this point. Again, Lord Alverstone found great difficulty in deciding this case, and did not appear to be quite satisfied that the conclusion to which he came was right.

In argument on behalf of the respondents much reliance was placed upon the fact that under s. 19, sub-s. 2, of the statute of 1910 the compensation authority might, if they thought it expedient, after giving the persons interested in the licensed premises an opportunity of being heard, and unless it appears to them unnecessary after giving a similar opportunity to any other person appearing to be interested in the question of the renewal of the licence of those premises (including the licensing justices), refuse the renewal of any licence. The words "including the licensing justices" merely

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mean that the licensing justices are to get an opportunity of being heard similar to that accorded to the other members of the class in which the statute has included them—namely, the class of person appearing to the compensation authority to be interested in the question of the renewal of the licence of the premises. It could not possibly have been intended by this statute to authorize a practice which would, I think, be inconsistent with the proper administration of justice—namely, that a licensing justice, one of the members of the compensation authority, should, on a given occasion, descend from the Bench, give his evidence on oath, and then return to his place upon the Bench to give a decision possibly based on his own evidence. Nor do I think it could ever have been intended by this provision to authorize the adoption of a practice in a magisterial court according to which one of the presiding justices could descend from the Bench to the Bar, and having delivered as an advocate an argument in support or justification of a decision to which at an earlier stage of the proceedings he had been a party, to resume his position on the Bench, and make an ultimate decision of the kind he had from the Bar urged the Bench to adopt. Such a practice would, I think, destroy all public confidence in the impartial administration of justice in the magistrates' courts. It would naturally be considered an abuse by the justice of his position if he had recourse to it. But how is the thing changed in nature and character, or in its effect on the administration of justice, if the magistrate does not leave the Bench, nor act the part of advocate himself, but retains a solicitor to urge upon a Bench, composed in part of his own clients, to combine to support a decision those clients have already made ?

The first question for decision in the case is : Was the act of the compensation authority in refusing a renewal of the licence applied for by the appellants a judicial or merely an administrative act ? And second, if it was a judicial act, were the members of that authority who took part in it, or any of them, actuated by bias or were they not ?

I use the words "any of them" in this connection advisedly,

because it was decided in *Reg.* v. *Hertfordshire Justices* (1), that if one of the magistrates who heard a case at sessions be interested in the issue the court is improperly constituted, and an order made in the case would be quashed on certiorari. In such a case it was held to be no answer that there was a majority of the justices presiding in favour of the decision arrived at without reckoning the vote of the interested party, nor was it of any effect that the latter party withdrew before the decision was made, if it appeared that he had joined in discussing the matter with the other magistrates. This case was decided by Lord Denman C.J., Patteson, Coleridge and Wightman JJ.

It is quite true that though the compensation authority does not fix the amount of compensation an owner or licensee is to receive for the loss inflicted upon him by being deprived of his licence, yet it does make the decision of that body the thing from which the right to proper compensation flows as a necessary result. And the compensation authority determines how the amount allocated by the Commissioners of Inland Revenue shall be divided amongst the people interested in unlicensed premises. That process necessarily decides on the conflicting pecuniary claims of persons according to their respective legal rights in the subject-matter.

Some of the authorities, which I think it well to cite, deal with each of these points. Before dealing in detail with them I think one should bear in mind what is the real nature of the decision of the compensation authority. It was, in effect, a decision confiscating a substantial interest of the appellants in their own property. It is common knowledge that a hotel is of much more value if licensed to sell intoxicating liquors than if not so licensed. If, therefore, the compensating authority makes a decision, the consequence and direct effect of which is to deprive the owner of the house of the privilege of carrying on therein a business of a certain kind, the loss of which privilege lessens the value of his house to a considerable extent, then the decision involves in a sense a compulsory diminution in value or confiscation of the subject's

(1) (1845) 6 Q. B. 753.

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property. That should be done, if at all, properly in due form of law. The fact that the public good may follow is no excuse for committing an illegality to secure it.

One of the best definitions of a judicial act as distinguished from an administrative act is that given by the late May C.J. in the Irish case of *Reg.* (*John M'Evoy*) v. *Dublin Corporation.* (1) There, though the borough fund of the corporation was otherwise sufficient for all legitimate purposes, it was rendered insufficient by reason of illegal payments having been made out of it, and other sums having been improperly charged upon it. The corporation levied a borough rate to make up the deficiency. It was held, upon an application for a certiorari, that the rate was illegal and that all orders and resolutions of the corporation imposing it, and the precepts to the Collector-General to levy it, should be quashed. May C.J. said: "It has been contended in this case that no certiorari can issue to remove the borough-rate, and this point must be first considered. It is established that the writ of certiorari does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connection the term 'judicial' does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others. And if there be a body empowered by law to inquire into facts, make estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequence would be judicial acts."

This definition was apparently approved of by Palles C.B. in *In re Local Government Board. Ex parte Kingstown Commissioners* (2), and also in *Reg.* (*Monaghan County Council*) v. *Local Government Board.* (3) In this last named case the point to be decided arose on s. 115, sub-s. 19, of

(1) (1878) 2 L. R. Ir. 371, 376. affirmed 18 L. R. Ir. 509.
(2) (1885) 16 L. R. Ir. 150; (3) 34 I. L. T. 196.

the Irish Local Government Act (61 & 62 Vict. c. 37), which provided amongst other things that any existing officer transferred under the section was to hold his office by the same tenure as theretofore, and, while performing the same or analogous duties, should receive not less remuneration than theretofore, and if by reason of any alteration of boundary or other thing done by or in pursuance of the Act his duties were increased or diminished, the officer should be bound to perform those duties, and should receive such increase or diminution of remuneration in proportion to such increase or diminution of his duties as the Local Government Board may determine. It was held that the act done by the Local Government Board in fixing the remuneration a transferred officer was to receive was a judicial act, and that this action could be reversed by the Court on certiorari if they exceeded their jurisdiction. In many modern cases it has been decided that with regard to granting licences the council act judicially.

There is a close resemblance between the case of *Reg.* v. *London County Council. Ex parte Akkersdyk* (1) and the present case. There the London County Council had delegated, as they were by the Local Government Act of 1888 empowered to do, the hearing of applications for licences for music and dancing to a committee of the council. This committee on this occasion sat on October 1, 1891, at Clerkenwell Session House, on which occasion Akkersdyk and Fermenia applied for licences for music and dancing for the two respective premises the Angel public house and the Rose and Crown public house, belonging to Fermenia. The two cases were heard together. Both sets of premises had been previously licensed. Evidence was given touching both houses, and in each case a majority of the committee voted against granting the licence, which was accordingly refused, the applicants being informed they were to apply to the council.

On October 23, 1891, the London County Council sat at Spring Gardens, the two applicants appeared before the council, and renewed their application for licences for music

(1) [1892] 1 Q. B. 190, 193, 195.

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and dancing. It then appeared that four members of the London County Council, all of whom were members of the committee, and had voted with the majority of the committee against the application for licences, and three of whom were present at the meeting of the council, were represented before the council by a barrister instructed by a solicitor, who opposed the granting of the licences. Ultimately the council by a majority resolved to refuse the licences. In marked contrast to the present case, however, none of the members who were represented by counsel voted on the decision. A rule nisi had been granted on the application of Akkersdyk calling on the council to show cause why a writ of mandamus should not be issued commanding the council to hear and determine according to law the application of Akkersdyk for a licence for music and dancing in respect of his premises, the Angel and Crown public house, and a similar rule was granted on the application of Fermenia, the landlord of a public house called the Rose and Crown. Both cases were heard together. Mr. Poland Q.C. and Mr. Avory (as he then was) appeared for the London County Council to show cause. Their argument was that the London County Council acted within their rights, and that the resolutions refusing these licences were valid, but that it must be conceded that if a similar state of facts had occurred with regard to justices sitting at quarter sessions the proceedings would have been invalid, but that the council in this case were acting in the performance of administrative, not of judicial, duties; that the council was a body which was elected, and candidates are entitled to stand as advocating particular views and opinions. A. L. Smith J. (as he then was) delivered the judgment. It is a long and elaborate judgment, and is characterized by the knowledge of legal principles, and sound common sense, which always distinguish his judgments. At p. 193 of the report he said: "The real question we have to determine is, whether the London County Council have heard and determined Akkersdyk's application according to law; if yes, then the rule must be discharged; aliter if they have not."

At p. 195 he says: "Mr. Poland argued that the London County Council were an elected body, and not justices sitting in quarter sessions; and in this we agree. It is true that, by the statute 25 Geo. 2, c. 36, justices, and now, by the Local Government Act, 1888, the county council are authorized to grant or refuse a licence as they 'in their discretion shall think proper'; but the discretion is to be exercised, as Lord Halsbury puts it, in *Sharp* v. *Wakefield* (1), 'according to the rules of reason and justice.'" It might be well to set out the entire of the paragraph in which these words occur; he said: "An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and 'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's Case* (2); according to law, and not humour." A. L. Smith J. continues: "In our judgment the London County Council are adjudicating as to whether a man is or is not to be deprived of his licence; to use the words of Cotton L.J. in *Leeson* v. *General Council of Medical Education* (3), 'Though not in the ordinary sense judges, they have to decide judicially as to whether or not the complaint made is well founded.' In our judgment, when so acting, they are not emancipated from the ordinary principles upon which justice is administered in this kingdom, and which are, as it has been said, founded on its very essence. It is conceded by Mr. Poland that, if the London County Council adjudicated in a matter of a music and dancing licence against an applicant without hearing him, such an adjudication could not stand. He also admitted that, if any of the council adjudicating had a pecuniary interest in the subject-matter, such adjudication also could not stand. Then why is an adjudication in which gentlemen have acted both as judges and accusers at the same time to be upheld? There is a sequence of authority holding that it cannot be, and it suffices to quote

(1) [1891] A. C. 173, 179. (2) (1598) 5 Rep. 100*a*.
(3) 43 Ch. D. 379.

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a passage from the judgment of Cotton L.J. in the case above named, in which he says (1), 'Of course the rule is very plain, that no man can be plaintiff or prosecutor in any action, and at the same time sit in judgment to decide in that particular case, either in his own case, or in any case where he brings forward the accusation or complaint in which the order is made.' And yet this is precisely what, in the present case, the three councillors have done. But it was argued, that after it had appeared that they were, in fact, both accusers and judges, they no longer took part in the deliberations of the council." The learned judge then referred to what Blackburn J. said in *The Queen* v. *Meyer* (2)—namely, this: "We cannot go into the question whether the interested justice took no part in the matter (i.e., in the discussion of the case). The question is, was he so interested in the matter as that he ought not to have sat?" In the present case no question of this kind can arise, as it is admitted that all justices interested retired together and discussed the case. The rule for a mandamus to hear and determine both cases according to law was accordingly made absolute.

Nine years later—namely, in the year 1901—the same learned judge who delivered the judgment in the last mentioned case (he had meanwhile become Master of the Rolls) delivered the leading judgment in the case of *Rex* v. *Sunderland Justices* (3), in a Court consisting, in addition to himself, of Vaughan Williams L.J. and Stirling L.J. In this case, which is a most important one, the Corporation of Sunderland purchased for improvement purposes certain premises licensed for the sale of intoxicating liquors. The corporation then entered into an agreement with a brewery company, by which the company undertook to pay to the corporation a certain sum of money in the event of the company obtaining a licence for the sale of intoxicating liquor for certain premises belonging to them, and the corporation agreed to close the licensed premises they had purchased, and not to make or

(1) 43 Ch. D. 379. (2) (1875) 1 Q. B. D. 173.
(3) [1901] 2 K. B. 357.

allow to be made any application for a renewal of a licence in respect of them. Certain justices of the borough who were also members of the borough council had taken an active part in the council in support of the proposal that the above mentioned agreement should be entered into by the corporation. These justices subsequently sat on the hearing of an application on behalf of the brewery company to the licensing committee for a licence in respect of the before mentioned premises, which was granted. On the application to the confirming authority under the Licensing Act of 1872 for the confirmation of the grant of the licence to the company, several justices again sat to hear the application, which was granted. On an application for a certiorari to bring up and quash the order confirming the grant of the licence, it was held that, there being a real likelihood of bias on the part of the above mentioned justices with regard to the subject-matter of the application to the confirming authority, the certiorari should issue. The Master of the Rolls said (1): "It appears to me that, in cases where the decision of justices is impeached on the ground of a bias such as is suggested in the present case, the decision must really turn on the question of fact, whether there was or was not under the circumstances a real likelihood that there would be a bias on the part of the justices alleged to have been so biassed. If there is such a likelihood, then it is clearly in accordance with natural justice and common sense that the justices likely to be so biassed should be incapacitated from sitting." He refers to the cases of *Reg.* v. *Rand* (2) and *Reg.* v. *Meyer* (3), and points out that the decision in the case of *Boulter* v. *Kent Justices* (4) only related to the proceedings before the licensing committee, not to the meeting of the confirming authority; that the House of Lords held that the licensing meeting was not a court of summary jurisdiction; and that Channell J., in deciding *Reg.* v. *Manchester Justices* (5), held that certiorari would lie to

(1) [1901] 2 K. B. 364.
(2) L. R. 1 Q. B. 230.
(3) 1 Q. B. D. 173.
(4) [1897] A. C. 556.
(5) [1899] 1 Q. B. 571.

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bring up an order made by the justices as the confirming authority under the Licensing Acts. He says he agreed with Channell J. in the conclusion at which he arrived, and on the grounds which he gave for it. Vaughan Williams L.J. agrees with Channell J. on the point. (1) After dealing with the facts at some length, the Master of the Rolls states the conclusion at which he has arrived in these words (2): "There is strong evidence that certain members of the borough council, who, being justices, afterwards sat at the licensing meeting, and as members of the confirming authority, took a very keen and lively interest in getting the agreement, by which this arrangement was to be carried into effect, adopted by the corporation. It is impossible to read the report of the speech made by the chairman of the highways committee, at the meeting of the borough council at which the question whether the agreement should be entered into was discussed, without seeing that he took an active interest in getting the proposed agreement adopted by the council. Another member of the council, who also was a justice for the borough, moved the resolution for acceptance of the tender made by Duncan and Dalgleish, Limited. Both these gentlemen, as well as other members of the borough council, subsequently sat on the licensing committee, when the licence in respect of the brewery company's premises in Pallion Road was granted, and again, as members of the confirming authority, when it was confirmed." He then adopts and applies to the facts the rule laid down by Blackburn J. in *Reg.* v. *Rand* (3), and ultimately holds that the appeal should be allowed, and the rule for a certiorari be made absolute. Vaughan Williams L.J. puts the test in a forcible and practical form; he said (4): "Can it be said here that there was nothing more than a mere possibility or suspicion that these justices would be biassed? We must judge of this matter as a reasonable man would judge of any matter in the conduct of his own business. Can one doubt that a reasonable man as a matter of business would, under the circumstances of this case, infallibly draw

(1) [1901] 2 K. B. 370.
(2) [1901] 2 K. B. 365.
(3) L. R. 1 Q. B. 230.
(4) [1901] 2 K. B. 373.

the inference that the justices who had negotiated and brought about this agreement would have a real bias in favour of granting the licence to Duncan and Dalgleish, Limited, the parties to it ? "

In the present case I cannot account for the action of the licensing justices in immediately after they had decided to refuse the renewal of these two licences directing that a solicitor should be retained to oppose the renewal of the licences by the confirming authority—the compensation authority—without apparently any qualification, and without reference to anything which might turn up on the hearing before the latter authority. The licensing justices obviously took up the position towards the applicants for those licences of hostile litigants and sustained that character to the end. They thus became at once to a certain extent prosecutors and judges in the same cause, and by their action gave to any reasonable man with knowledge of the facts grounds for the inference that they were, in what they did, not actuated by a sincere desire to secure the impartial administration of the law in the matter of the renewal of these licences, but were, for some cause or other, biased in their efforts to defeat the appellants' applications.

If that conclusion does them an injustice they have themselves to blame, because they have omitted to give any reason which will bear examination for departing from what is, I understand, the usual practice, and appointing a solicitor to appear on their behalf before a judicial tribunal of which they are members.

I concur with Atkin L.J.'s judgment, which I think is quite convincing. I think the appeal succeeds ; that the order of the Court of Appeal of February 19, 1925, should be reversed ; that the order of the King's Bench Division bearing date October 28, 1924, should be discharged, and that the writ of certiorari mentioned on p. 15 of the Appendix should issue.

LORD SUMNER. My Lords, in the Court of Appeal Bankes L.J. says at the end of his judgment (1) : " Under

(1) [1925] 1 K. B. 703.

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the circumstances, I do not think that it would be fair to the justices to say that instructions given under these circumstances, whether to the police or to a solicitor, ought to be regarded as an indication of such a real likelihood of bias as would entitle a Court to interfere. The real cause of complaint, to my mind, is that the justices who acted as the renewal authority acted again as members of the compensation authority. If, under the circumstances, the Court cannot interfere to prevent this, it appears to me to be a case of straining at a gnat after swallowing a camel to complain of the appearance of the solicitor."

On the other hand, in his dissenting judgment, Atkin L.J. observes (1): "The question therefore is: Was there or was there not in the circumstances a real likelihood that there would be bias on the part of some of the justices who were parties to the decision? The justices have to decide judicially whether a particular licence should be renewed upon evidence given upon oath. They have already caused an advocate to be instructed to oppose the renewal and to call evidence in support of the opposition. Can there be two reasonable answers to the question whether there is a real likelihood that they would be biased in favour of the arguments and evidence which they have caused to be adduced and in favour of the decision which they have retained an advocate to support?"

These two passages define by their contrast the issue, narrow perhaps but very important, which your Lordships are now called upon to decide.

My Lords, I think more has been made than was necessary of the precise terms in which the status of justices sitting as the compensation authority under the Licensing Act, 1910, ought to be described. They do not constitute a Court of law. Those members of it, who have themselves reported to it on the redundancy of a specific licensed house, prefer no charge against its owners or occupiers, nor do they prosecute any one before a tribunal, of which they are members. There is no lis pending in a Court nor any contestation between

(1) [1925] 1 K. B. 712.

parties, when the renewal justices make their report to the compensation authority and the authority determines the question of renewing the licence. The subject matter of the proceeding is administrative ; it is governed by a statutory code and, consistently therewith, by established legal practice. It has been the intention of the Legislature that in dealing with such matters the licensing and compensation authorities should have the benefit of the personal knowledge and experience of individual justices.

My Lords, be it so. There is authority for all this, which I forbear to cite in detail. On the other hand it is none the less true, that the matter for decision affects the property of the owner and the livelihood of the occupier of the premises, both of whom in this case objected to the proposed refusal to renew the licence. Whether or not such a refusal, when accompanied by a right to compensation, is a serious grievance or a grievance at all, is not the question. It was the duty of the compensation authority on the occasion in question to address their minds to the issue with impartiality and fairness, and there is jurisdiction in the High Court, in one form of procedure or another, to set aside their decision, if there has been a failure to do so. The question is what in such things impartiality and fairness are, and whether in this particular case the matters which have been objected to constitute a failure in that regard, so as to justify resort to the jurisdiction.

The nature of the complaint is sufficiently normal, and nothing is alleged that is personally derogatory to any of those concerned. On April 30, 1924, having previously heard evidence on oath, the licensing justices decided to refer the question of the renewal of the licence for the Seven Dials to the compensation authority. At a subsequent meeting they directed their clerk to instruct an eminent solicitor of Bath to act for them in opposing the renewal of this and other licences. Though I do not wish to suggest that, by merely following the words of the Act, the licensing justices would have avoided all offence, I think it remarkable that they have departed from them in this resolution. The

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solicitor is not merely to apply to be heard in respect of the interest of the licensing justices in the question. He is to be instructed to oppose the renewal. It is one thing to say, "see that our point of view is clearly explained." It is quite another to say, "fight the application and try to make our opinion prevail." The form of the resolution is, I think, strong evidence of the determination of the licensing justices to be of the same opinion still. I pass by the point, that the retainer was that of the clerk to the justices and not that of the justices themselves, for I think it is an empty quibble, but it may be material, on the question of bias or of the real likelihood of bias, that none of the justices, whose action is complained of, took any personal part in the preparation of the instructions. The clerk furnished the solicitor with a copy of the licensing justices' report to the compensation authority, showed him the notes of the evidence which he had taken at the hearing, and requested him to apply to the police for any further particulars he might require or desire. At the sitting of the compensation authority the solicitor attended, stated that he appeared to represent the licensing justices, and, when the evidence was called and the case was argued, took such part as he thought fit. I assume that he was scrupulous to do no more in the way of pressing his opposition to the renewal than was legitimate in an advocate instructed to oppose. I assume also that within these limits he used all the powers of persuasion and argument with which he was presumably gifted. If so, his appearance in such a capacity could not but affect the minds of those to whom he addressed himself, and among the justices, whose decision he was thus endeavouring to influence, were those, or some of those, who had directed that he should be retained to appear for them to oppose the renewal. I think that the licensing justices thus placed themselves in a dilemma. If the appearance of the solicitor was not to affect their minds, this must be because they paid no attention to him, their minds being already made up. On the other hand, if it was, they had themselves taken very effective steps to

ensure that their open minds would be finally determined in the direction already settled.

The Licensing Act, 1910, provides that licensing justices, on an occasion on which they report particular premises to the compensation authority, are entitled to be represented, which includes professional representation, and, in the case of a county borough, as Bath is, it further provides in effect that the justices, who have sat to hear and determine the original application for renewal, shall be qualified to sit and take part in the hearing and determination of the matter, when it comes before the compensation authority on the reference. The Act does not say that they are bound to do either of these things. It does not say whether the power to be represented and the power to be present and to vote are cumulative or alternative. It does not define for what purposes either of these provisions is made. I do not wish to say that, as a matter of construction, these provisions are merely alternative. I think the real question is whether anything can be collected from them which will have the effect of ousting the jurisdiction of the High Court, which is exercisable in cases of bias or of reasonable likelihood of bias in the minds of those renewal justices who sit and vote as members of the compensation authority.

That there may be inconvenience, unless both powers are exercised, I think may sometimes be the case. There may be difficulty in obtaining the attendance of a quorum of justices to sit on the compensation authority, if the licensing justices, who have reported to it, all stay away. There may be some disadvantage to the applicants for renewal, if they do not hear at the authority's meeting some public statement from a representative of the renewal justices to supplement what is stated in the report or may be surmised from the course which the proceedings before the renewal justices may have taken. It does not, however, appear to me that either kind of disadvantage is really frequent or serious.

What, then, is the real likelihood of bias in the minds of members of the compensation authority, who have previously sat at the Renewal Sessions and have voted to refer the

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licence as redundant, when such a course, as is here in question, is pursued? It would be pedantic to expect that a justice, who has recently held the Seven Dials to be redundant, must come to the compensation meeting with his mind as open as if he had never formed any opinion at all. Nevertheless, he has to take part in a hearing de novo, where fresh evidence may be given or old evidence may be improved or shaken by new considerations, and he ought to be capable of giving and to be likely to give these things his best attention. He is not to be predisposed to leave all that sort of thing to be settled between the solicitor, who opposes for him, and those colleagues, who have not been into the matter before. A justice may perhaps be entitled to say, that in mind and manner he must be taken as he is, and that, if his mental outfit is less than judicial, the responsibility rests with those who, by recommending his appointment to the commission of the peace, have made him so much more than he previously was. About public houses opinion runs high. There are persons to whom all public houses seem redundant, and in practice all sorts of views are represented. On this occasion I express no opinion as to the likelihood of bias in the minds of those whose consciences require them to attend such proceedings in order to give votes which are always foregone conclusions. Another question now arises. In such a case as the present, what is likely to be the effect produced by the appearance of an eminent solicitor on behalf of the renewal justices? Several results occur to me. A justice, who has joined in directing the retainer, may say to himself, "our case is in his hands. It is for him to satisfy the members of the committee, who have not been into this before. I am convinced whatever happens." Again he may say, "I voted against the Seven Dials before. I did not like the house, though I own I did not quite know why, but this gentleman's speech puts the objection admirably, and I need trouble no more about the matter." Half a dozen other things may be put, all leading to his voting as before and acting on the compensation authority more as a dormant partner than as an open mind. It is quite true, on the other

hand, that, if no solicitor were instructed, the same justice might still act and think in the same way. He might even be himself as persuasive an advocate, when the members of the compensation authority retire to consult, as the solicitor could have been during the actual hearing. Again it is quite true that he may be specially on his guard, just because he has been into the matter before and has made up his own mind and has decided that a solicitor shall be engaged to make up his colleagues' minds in the same direction. He may, on the other hand, have forgotten all about it, and be able to take in the whole thing afresh. He may even change his mind and his vote too. Without intending the least disrespect to any of the justices of the county borough of Bath, I think the latter series of mental operations distinctly less probable than the former, and consequently that, in the circumstances of the case, there existed in the justices, whose conduct is impugned, such a likelihood of bias as the parties interested in the renewal could not justly be called upon to risk.

My Lords, as to authorities, I think that the case of the *Cheshire Justices* (1) cannot be treated as deciding that, in connection with licensing business, the determination of justices is not open to review, where they have been biased or likely to be biased. Their duty to act honestly is not confined to mere abstinence from pecuniary corruption. They must use the impartiality and fairness which are characteristic of an honest judge. It is thus that I understand Lord Loreburn's language in *Leeds Corporation* v. *Ryder*. (2) If the judgment now appealed against be affirmed, it is in effect a disapproval of the case of *Akkersdyk* (3), an authority of considerable standing and, as I venture to think, a sound one. I do not think that the words of s. 19, sub-s. 2, "and, unless it appears to the compensation authority unnecessary, any other persons appearing to them to be interested in the question of the renewal of the licence of those premises (including the licensing justices)" can be regarded as a

(1) [1906] 1 K. B. 362. (2) [1907] A. C. 420, 423.
(3) [1892] 1 Q. B. 190.

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statutory recognition of such an "interest" in the licensing justices as puts all questions of bias on one side, nor does it constitute the compensation authority the sole guardian of the other interested parties against the risk that the interest of those justices may be unduly predominant. If, as *Colchester Brewing Co.* v. *Tendring Licensing Justices* (1) shows, the compensation authority itself, as a whole, was bound to act judicially on the occasion in question, presumably each member was bound to act in that manner also. I find nothing in the Act which makes any exception of the justices whose report was referred to the meeting, or authorizes them to be biased or to be likely to be biased, when others may not be so. If bias in such a case was inevitable, of course the Act, in making them members of the compensation authority, would have made that authority pro tanto a biased body, whose conduct could not be impugned on that ground, but it is not. Mr. Wethered, for the respondents, in an attractive and original argument, advanced the proposition that the statute, taken as a whole and in the light of the previous law, which it was passed to amend, had some such a view in contemplation. The Act was passed to ameliorate the situation arising from the legal power of licensing justices to refuse renewals and their inability to provide for any compensation. In these circumstances it might have been expected, that if any control over their actions was contemplated, other than that expressly introduced under the scheme of the Act, some express provision would have been made for it. On the contrary s. 6, sub-s. 5, seems to be inconsistent with any power of review. The Legislature, knowing the conflicts that will arise where pecuniary interests are affected as well as matters of social regulation and moral conduct, perceived that a complete absence of any bias, or at any rate of any appearance of it, was unattainable; that under the jealous eyes of partisans, always critical and often censorious, justices would never get complete credit for impartiality, and that it was better to be content with the substance than to strive for an impossible perfection of form.

(1) [1916] 2 K. B. 126.

This novel argument I have not been able to accept, nor, with all respect to those who hold the contrary view, do I think it conclusive to dwell on the administrative character of the compensation authority to the exclusion of any consideration of bias. Accordingly, I think the appeal succeeds. Your Lordships were not asked to deal with the form of the remedy sought by the brewery company. Although it is discussed by Atkin L.J. I offer no opinion upon it now.

LORD CARSON. My Lords, I also am of opinion that this appeal succeeds. There is no doubt some difficulty in laying down any fixed rule as to " bias " in cases where magistrates under the Licensing Acts are frequently compelled to mix up what might be called administrative with what might be called judicial action. This arises from no fault of the magistrates, upon whom the Legislature have cast the burden of carrying out the question of the renewal of licences by a statutory code which they are, of course, bound to obey, and no doubt, as Lord Sumner has pointed out, it was the intention of the Legislature that in dealing with such matters the licensing and compensation authorities should have the benefit of the personal knowledge and experience of individual justices. This consideration, however, must not be held to relieve them from their duty to conduct their proceedings and arrive at decisions which affect property and rights in accordance with well established rules laid down for the purpose of procuring a fair and unbiased judgment. It may be, as Bankes L.J. has said in the passage quoted by Lord Sumner, that the real cause of complaint is that the justices who acted as the renewal authority acted again as members of the compensation authority, but that cannot be avoided, because the Legislature has so ordained. That, however, is not to my mind a reason for saying that the magistrates are not to abstain from any action which might indicate a likelihood of bias, and the fact that there is no lis or what might be called any case existing between parties, affords no justification for not insisting upon the very

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elementary rule that a man cannot act as a judge and as an advocate in carrying out the duties cast upon him. The question in the present case is, can magistrates who have appointed a solicitor to put forward and insist upon certain decisions already come to by justices, act as members of the compensation authority, which is to give the final decision? Is there in such a case such a likelihood of bias as entitled the Court to interfere?

My Lords, I think one has only to state the proposition to show how futile the whole inquiry would become, and how unsatisfactory, I might almost say farcical, it must appear in the eyes of those whose property is to be affected, if any such course should be considered legal. As was said by Lord Blackburn in *Reg.* v. *Rand* (1), what has happened in this case is "an objection, not in the nature of interest, but of a challenge to the favour."

In my opinion the case is a stronger one than that of *Reg.* v. *Fraser* (2), where a magistrate who was a member of a particular council of a religious body one of the objects of which was to oppose the renewal of licences, was present at a meeting at which it was decided that the council should oppose the transfer or renewal of the licences, and that a solicitor should be instructed to act for the council at the meeting of the magistrates when the case came on. A solicitor was so instructed, and opposed the particular licence, and the magistrate sat on the bench and took part in the decision. The Court in that case came to the conclusion that the magistrate was disqualified on account of bias, and that the decision to refuse the licence was bad. No one imputed mala fides to the magistrate, but Cave J., in giving judgment, said: "the question was, What would be likely to endanger the respect or diminish the confidence which it was desirable should exist in the administration of justice?" Wright J. stated that although the magistrate had acted from excellent motives and feelings, he still had done so contrary to a well settled principle of law, which affected the character of the administration of justice.

(1) L. R. 1 Q. B. 230. (2) 9 Times L. R. 613.

The case also seems to me to be covered by the judgment in the case of *Akkersdyk* (1), and I see no ground for departing from the views there laid down. I am, therefore, of opinion, as I said before, that this appeal succeeds.

Order of the Court of Appeal reversed, and cause remitted back to the King's Bench Division, with a direction that the Order nisi be made absolute and to do therein as shall be just and consistent with this judgment. The respondents to pay the costs in the Courts below, and also the costs of the appeal to this House.

Lords' Journals, May 7, 1926.

Solicitors for the appellants: *Godden, Holme & Ward, for Wansbroughs, Robinson, Tayler & Taylor, Bristol.*

Solicitors for the respondents: *Church, Adams, Tatham & Co., for Withy & King, Bath.*

[HOUSE OF LORDS.]

GUARDIANS OF THE POOR OF SALFORD UNION . . . . . } APPELLANTS;

AND

DEWHURST . . . . . RESPONDENT.

Statute—Contracting Out—No express Prohibition—Poor Law Officers and Servants—Compulsory Pensions Scheme—Compulsory Contributions—Poor Law Officers' Superannuation Act, 1896 (59 & 60 *Vict. c.* 50), *ss.* 2, 3, 8, 10, 12, 13, 15—*Poor Law Officers' Superannuation Act Amendment Act*, 1897 (60 & 61 *Vict. c.* 28), *s.* 1.

A compulsory scheme for providing superannuation pensions for poor law officers and servants was established by the Poor Law Officers' Superannuation Act, 1896. Obligatory pensions were payable by the guardians and obligatory contributions by the officers and servants.

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* *Present:* VISCOUNT CAVE L.C., LORD SHAW OF DUNFERMLINE, LORD SUMNER, LORD PARMOOR, and LORD BLANESBURGH.

(1) [1892] 1 Q. B. 190.

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The pensions were expressly made inalienable, but there was no express provision against contracting out:—

Held (by Viscount Cave L.C., Lord Shaw of Dunfermline, Lord Parmoor and Lord Blanesburgh; Lord Sumner dissenting), upon the construction of the Act, that it was not open either to the guardians or to their officers or servants to contract themselves out of the statutory obligations and rights respectively imposed or conferred upon them by the Act.

Decision of the Court of Appeal [1925] Ch. 655 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Astbury J. (2)

The respondent was an officer in the appellants' employment from February 10, 1908, to May, 1922, when he retired on account of ill health and became entitled to a superannuation allowance under s. 3 of the Poor Law Officers' Superannuation Act, 1896.

During the last five years of his service the respondent received as remuneration the total sum of 1288*l.* 19*s.* 9*d.*, being 780*l.* by way of salary and 508*l.* 19*s.* 9*d.* by way of war bonus. Pursuant to the provisions of the Act the appellants during the said employment annually deducted 2 per cent. from the respondent's salary, but they did not deduct any amount from the bonus. The payments of bonus from July, 1918, onwards were made subject to two circular letters dated March 12, 1918, and July 11, 1919, in which the appellants intimated to their officers and servants that no deductions for superannuation purposes would be made from the bonus and that the bonus payments were not "emoluments" within the meaning of the Act and would not rank in the calculation of any superannuation benefits, and the letters further stated that if no objection to the contrary were forthcoming it would be assumed that the officers and servants accepted these terms. The respondent took no exception to the circular letters. In computing the respondent's superannuation allowance the appellants disregarded the bonus and based their computation on his salary alone. The respondent tendered to the appellants a sum of 12*l.*, representing 2 per cent. of the bonus payments, and, on the refusal of the appellants to accept it, he brought

(1) [1925] Ch. 655. (2) [1925] Ch. 139.

this action against them for a declaration that the bonus ought to be included in the computation and for an account and payment accordingly.

Astbury J. held that as the Act contained no express prohibition against contracting out the respondent had power to contract himself out, and he dismissed the action.

The Court of Appeal (Pollock M.R., Warrington and Sargant L.JJ.) held upon the construction of the Act that the respondent had no power to contract himself out.

1926. June 15, 17. *Luxmoore K.C.* and *Cecil Turner* for the appellants. The Act of 1896 does not expressly prohibit guardians from entering into a contract with their officers affecting their pensions. Therefore the question is whether the ordinary principle of freedom of contract is impliedly interfered with. Where the Legislature intends to prohibit the right of a man to contract himself out of the provisions of an Act of Parliament express words are used, and in the absence of such words the Court will not presume that intention unless some grave question of public policy is involved. The principle of construction laid down by Field J. in *Griffiths* v. *Earl of Dudley* (1) and by Lord Selborne in *Great Eastern Ry. Co.* v. *Goldsmid* (2) covers this case. Sect. 15, on which the Court of Appeal relied, does not touch the question. That section gives an officer in the service of a union at the commencement of the Act power to elect not to avail himself of the Act whether the guardians agree or not, and the amending Act of 1897 gives a similar power to female nurses. Nor can any argument be based on s. 10, which makes the superannuation allowance inalienable, for it is the same as the corresponding provision in the Superannuation Act of 1864 where the grants were purely voluntary.

Archer K.C. and *E. H. Tindal Atkinson* for the respondent. Upon the true construction of this Act the Legislature intended to create a complete compulsory scheme of superannuation allowances under which a definite inalienable provision is constituted for the personal support of the officers of the

(1) (1882) 9 Q. B. D. 357, 364. (2) (1884) 9 App. Cas. 927, 936.

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guardians after superannuation; and to allow the guardians to depart from this statutory scheme by means of a private contract with their officers would be to defeat the whole purpose of the Act. The respondent asks no more than that full effect shall be given to the imperative words of the Act. Here there are express words of obligation, and there is nothing in the Act to get rid of that obligation. Sect. 15 throws some light upon the question, because if the Legislature had not intended the scheme to be compulsory the power conferred by that section would have been superfluous. Sect. 10 also points in the same direction. It is true that a similar provision was contained in the Act of 1864, but the Legislature has now gone a step further. The Act of 1864 said that the pension should be inalienable. The Act of 1896 secures that the pension shall be forthcoming.

Luxmoore K.C. replied.

VISCOUNT CAVE L.C. My Lords, this appeal has been very ably argued, but I feel no doubt as to the conclusion at which your Lordships ought to arrive.

The Poor Law Officers' Superannuation Act, 1896, provided by s. 2 that every officer who should have attained a certain age, or should have become incapable of discharging his duties for certain reasons, should be entitled, on resigning or otherwise ceasing to hold his office or employment, to receive during life out of the common fund of the union a superannuation allowance according to the scale laid down in the Act. The scale was defined by s. 3 of the Act, and was fixed by a percentage upon the wages and emoluments of the officer during the five years immediately preceding the day on which he ceased to hold his office. Sect. 12 of the Act provided that every officer and servant concerned should contribute annually for the purposes of the Act a percentage of his salary and wages. No doubt that percentage was provided in order to assist the guardians to meet the charge for pensions, but probably it would not of itself be enough to cover that charge, and it would be necessary for the guardians to find something in addition. The only other section of the Act to which

I will refer at this moment is s. 10, which provides that "Every superannuation allowance granted under this Act shall be payable to or in trust for the officer or servant, and shall not be assignable or chargeable with his debts or other liabilities."

The late respondent, Mr. Dewhurst, was relieving officer of the Salford Union. In the year 1918, for reasons which every one can understand, the guardians of the union determined to give a temporary war bonus to their servants; and they announced that they would give it upon the distinct understanding that the bonus should be free from superannuation deductions and, consequently, should be beyond the scope of computation for the purposes of pension under the Act of 1896. That condition was made perfectly clear and was communicated to the several officers and servants concerned, including Mr. Dewhurst. Mr. Dewhurst did not expressly accept the condition, but he took the bonus without complaint or question. In May, 1922, he retired, and the guardians proposed to pay him a superannuation allowance based only upon his fixed remuneration and without counting the war bonus, together with some other small addition or gratuity. He objected and ultimately brought this action, claiming a declaration that his superannuation allowance should be computed by including the bonus as well as his ordinary salary. Astbury J. decided that question in favour of the defendants, but the Court of Appeal reversed that decision and the matter now comes to your Lordships' House.

My Lords, upon the argument of this appeal it was not questioned that the bonus is an "emolument" within the meaning of s. 3 of the statute fixing the computation of the pension. Nor was it disputed that Mr. Dewhurst, although he did not expressly accept the condition upon which the bonus was granted, took his bonus upon that basis, so that if the question were one between ordinary individuals there could be no doubt that there was something amounting to a contract to accept the condition imposed by the guardians. The only question which has been argued before your Lordships is this: Whether this board of guardians could validly enter into an agreement with one of their officers or servants

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under which the officer or servant was to receive something less than the pension or superannuation allowance provided for him by the statute? It is an important question, because it may have a bearing not only upon persons appointed officers or servants of boards of guardians, but upon the position of other persons—persons who under other statutes are entitled to superannuation allowances.

My Lords, in considering this question it is, I think, important to consider the purpose and scheme of the Act; such considerations are not necessarily conclusive, but they have their bearing on questions of construction. Now, we are dealing here with a public authority employing persons to perform public duties. The Act obviously contemplates that all officers so employed shall make contributions to the funds of the union and shall be entitled on retirement to pensions based on their salaries and emoluments. If in any respect that purpose can be, and is, frustrated, the effect may be that an officer who has given the best years of his life to the public service will be left during his old age without means of subsistence and dependent upon assistance of some other kind. It has also to be considered that, if it is lawful for a board to contract with some of their officers that the Act shall not apply to them, it may well be that on the doctrine of averages the charge for pensions falling upon the board may in some years be very greatly in excess—even more in excess than the statute appears to contemplate—of the income received for that purpose. It is also to be noted at this point that the Act of 1896 takes the place of the Act of 1864, and that the Act of 1864 was discretionary while the Act of 1896 contains imperative provisions.

My Lords, in the light of these general observations, I proceed to consider the effect of the language of this particular Act. I note first that s. 2 provides that "every" officer and servant in the service of any of the guardians of the union "shall" in certain events be entitled, on resigning his office, to receive a superannuation allowance. Those are imperative words, words of command, addressed to a public authority; and the question is whether they can be

abrogated by agreement. Similar language is contained in other sections of the Act, such as ss. 3, 6, and 8. Then you find in s. 10 a provision that a superannuation allowance granted under the Act shall not be assignable or chargeable with debts. Now, first, what is the effect of that provision in s. 10 preventing an officer from assigning or charging his pension? It certainly prevents him from assigning or charging it after it has commenced to be payable; I think that it equally prevents him from assigning or charging it after his appointment but before he ceases to hold his office; and I would be disposed to hold on those words alone that he is precluded from renouncing or releasing it in advance—that is to say, before or at the moment of his appointment. I think that the policy and the language of the Act point to that conclusion.

But there is another way of putting the question, and that is, Can the guardians by any action exclude the application of this statute to any of their officers? If they can, then the guardians have a ready way of relieving themselves from the burden imposed by the statute. In that case they can either before appointing a particular officer or servant, or before consenting to an increase of his remuneration, require him to agree with them that this particular statute shall not apply; indeed, they could make it their general practice before appointing any officer to make it a condition that he shall not be entitled to pension. I do not doubt that, if a board adopted that practice, they would find persons who would accept employment on those terms and would enter into an agreement that the Act shall not apply. If that is so, then it is in the option of boards of guardians to determine whether or not this statute shall apply, and they can (as one of the learned Lords Justices said) make the statute a dead letter. I cannot think that that was the intention of Parliament. It rather appears to me that by using the imperative terms to which I have referred, Parliament has indicated an intention that the Act shall apply, notwithstanding any agreement to the contrary, to every board of guardians and to every officer or servant of such a board.

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My Lords, the Court of Appeal attached some importance in this connection to the terms of s. 15 of the Act, which enables existing officers—that is, officers who were appointed before the passing of the Act—to elect not to come into the scheme of the Act, and to similar provisions contained in the amending Act of 1897, referring to female nurses. I do not myself attach the same importance to those enactments, for I doubt whether a provision that an officer may without any agreement elect not to come within the Act has any bearing upon the question whether the board and the officer may contract out of the Act.

On the other hand, stress has been laid to-day upon the provisions of s. 8 of the statute, but with great respect to those who may think otherwise, I do not myself consider that any useful inference can be based upon that section. It gives to certain officers who by no action or fault of their own vacate office before becoming entitled to a pension a right to the return of their contributions. It was obviously necessary to make some provision for those cases, and it was not unreasonable to say that in a case of that kind the officer should be entitled to the repayment of his contributions, so that if he obtained no pension he should at least suffer no loss. But it does not appear to me that this provision, which is wholly independent of any agreement, has any close bearing on the question which is raised on this appeal.

My Lords, I base my decision upon the whole scope and purpose of the statute, and upon the language of the sections to which I have specially referred, and on those grounds I am of opinion that the Court of Appeal came to the right conclusion. Accordingly, I move your Lordships that this appeal be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, I find myself in complete agreement with the judgment in the Court below and also with your Lordships, except perhaps that I would go further than your Lordships upon s. 15 of the statute, which deals with the transitional and exceptional period of three months after the passing of the Act. Construed

legitimately and per aversionem, that section appears to me to confirm the view as to the nature of the compulsory and statutory rights in the ordinary case, as taken in the Court below.

To save time, my Lords, I venture to adopt these two sentences in Sargant L.J.'s opinion: "The Act, in my view, constitutes a new scheme binding both on the guardians and each of their officers under which a definite inalienable provision is constituted for the personal support of the superannuation officers of the guardians." The other sentence is this: "To preserve the inalienability of the pension, which is what I think is meant by s. 10 of the Act, it is necessary to prohibit a release by bargain with the guardians just as much as an assignment to a third person, and it is to be noted that if this were not so the guardians of a particular union might render the Act a complete dead letter so far as they were concerned."

I think it is necessary to read and consider the Act as a whole. I read s. 2 as a complete and comprehensive declaration that subject to the provisions of the Act all the officers employed by guardians are to be entitled to superannuation allowances reckoned on their whole emoluments—in short, are to be pensionable persons. I read s. 12 as an equally complete and comprehensive declaration that those officers shall be liable to make certain contributions on the scale set forth in the Act.

These obligations, my Lords, are correlative. The title which is given, and must be given, according to the statute, to the officer, has its correlative in the obligation of the guardians to answer for the amount to which he is entitled. The obligation under s. 12 upon such a man has its practical correlative in the ticketing or earmarking of the funds so contributed in the common fund of the guardians. In these circumstances, my Lords, it would not require s. 10 to fortify the view I have pronounced, but reading, as I say, the Act as a whole, it appears to me that s. 10 is the amplest and clearest declaration that when a superannuation allowance comes to be granted it shall be payable to or in trust for the

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officer himself and shall not be assignable or chargeable with his debts.

My Lords, the argument against that view, which has been presented with elaboration and force, is that, notwithstanding all these provisions, it is still possible to contract out of the whole concern. It is, in my opinion, quite impossible, in view of that statute, that guardians can relieve themselves of all their statutory liability by appointing a class of pensionless servants, when Parliament in its wisdom has declared that this class of public servant shall be pensionable. Such an idea is, as I view it, contradictory both of the spirit and of the letter of this Superannuation Act. The whole scheme and scale and framework of the allowances and the contributions is made upon the footing that it is a comprehensive scheme, and to allow individual exceptions to be made at the will of the guardians would be contradictory to the Act as a whole, and might completely wreck the whole scheme, which must fundamentally rest upon some actuarial basis.

The argument in this case, however, my Lords, is still more peculiar than what I have put. For while logically it goes to the whole extent of asserting that this Act can be contracted out of, the present case is that both the guardians and the officers were in fact under the Act, they were in its scheme, they were bound by it, but yet they could, notwithstanding that, make a contract that they should be only partly bound and partly not bound. That argument was, however, answered by the admission that the bonus in question is in fact part of the emoluments of the officer and the admission at the Bar that it must be so treated in law. That being so, I see no ground whatsoever for saying that this Act shall be construed as imperative to the extent of a certain portion of the fund, and not imperative as regards the remainder. Were this permitted, then equally that would shatter the actuarial basis of the whole scheme.

My Lords, I have no doubt that the judgment of the Court of Appeal is correct.

LORD SUMNER. My Lords, I regret, I need hardly say, that, after giving such attention to this case as I could, I cannot uphold the judgment of the Court of Appeal, but I should not think of offering your Lordships a reasoned justification instead of a humble apology, were it not that the question appears to be one of considerable importance, which affects a much wider area than the mere dispute in the present case. So many persons in the employment of public bodies are now, under one form or another, in receipt of retirement allowances or pensions that the construction adopted in this case must assuredly affect the construction of many similar Acts. The circumstances, too, are such that in future, on the view which your Lordships take of the construction of this Act, no prudent public authority will risk any temporary generosity towards any of its employees, high or low, in the matter of their remuneration or emoluments, lest it should subsequently find a claim set up against it to carry that temporary assistance much further than the circumstances in themselves would ever have warranted.

The question depends entirely upon the construction of the Act, principally upon ss. 2 and 12. May I, however, first deal with the other sections that are said to be material? Sect. 15, I think, like the Act of the following year, is a mere provision in favour of a definitely limited class of persons, enabling them to elect unilaterally not to come under this legislation at all, and the fact that such opportunity is given to those persons throws no light upon the relations that are to exist under the Act between the employing authority and the persons who, either by election or by its terms, are brought within it. The present claim involves no contention that the guardians at their will can treat some persons as under the Act and some as not under the Act. So far as I am aware, that contention has never been put forward. Whether the Act can be departed from by consent of the two parties, employer and employed, as a matter of contract, depends upon the language of the other sections.

Next with regard to s. 10, in terms it applies only to a superannuation allowance "granted," and I take the word

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"granted" to speak from the time when the allowance is an existing payable allowance. I do not see how the right, for which s. 2 provides, can be properly spoken of as a superannuation allowance granted under this Act so as to be payable, referring as it does only to the prospective and inchoate rights which arise by virtue of that provision.

Sect. 2 is said to indicate the intention of the Legislature that the employee shall not strip himself of the benefit which the Act provides for him, and it is also said to be undesirable that the public should be harassed by the sight of old age brought in penury to the grave. I would like to point out that s. 8 expressly contemplates that the employee may do that very thing for himself if he likes, for, when he is about to become pensionable on old-age retirement, such a person can resign voluntarily, and in that case he goes his way and gets nothing. It is all very well to say that such things are not done, but it is the language of the Act which must be scrutinized for the purpose of seeing how much it covers, and the Act certainly contemplates that a man for whose sake the benevolence of the Legislature has been exercised may throw away his opportunities and voluntarily lose all these rights. I do not think, therefore, that the Legislature can have been very keenly occupied at any rate with assuring that, from his entrance into the service till he quits it, an employee shall always have this prospective provision before him.

Now to come to the actual scheme. Sect. 2 provides that there shall be a right to receive a superannuation allowance, and s. 12 that the officer or servant shall contribute annually by deductions from his wages, not to a pension fund or superannuation scheme, but to the common fund of the union, that is, to their general exchequer. If, as Sargant L.J. appears to have thought was the case, there had been in existence a special fund, created by contributions from the guardians and the officers, in which the officer could have a special interest, not only in respect of his own contributions, but also in those of all the other contributors, if it could have been said that these contributions were earmarked for the provision of the

superannuation fund, a very different argument would have arisen; but, with great respect for the learned Lord Justice, I think he was wrong in this, and the supposed fund seems to me to be a fallacious basis upon which to rest his conclusion.

Now, I do not think it is unfair to the respondent's argument to say that, if it does not actually require an implication of specific words into the statute, the Legislature could at any rate have expressed what is contended for in a few express words but has not thought fit to express it at all. It is perhaps better to say that according to his argument the language used involves the conclusion contended for. It rests upon the view that, because imperative words are used in ss. 2 and 12—"shall be entitled" and "shall contribute annually"—there is nothing more to be said except to see that the officers make their contributions and get their rights.

It is an error to suppose that s. 2 creates a pensionable class, consisting of all officers and servants in the service or employment of the guardians of the union. Not every officer and servant is entitled to receive a superannuation allowance, but only such officers and servants as continue in the service up to a certain age, who in one event have completed an aggregate service of forty years and attained the age of sixty, and in another event have attained the full age of sixty-five simpliciter, and a third class, who "shall become incapable of discharging the duties of their office with efficiency by reason of permanent infirmity" of mind, of body, or of age. A very considerable number of the officers and servants, not having lived long enough, or not having become incapable of discharging the duties of their office, would, except in a purely prospective way, never have any interest under this clause at all. The clause, however, is based upon the assumption that you are dealing with a person who is an officer or servant, and I think it is equally clear that s. 12 deals with persons falling within the contractual relation of servant and employer. It uses the words "every officer and servant in the service or employment of the guardians of the union." The obligation to contribute arises at the time when the contributor becomes a servant

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and after he is a servant, while the right to superannuation allowance accrues only when the conditions about age or infirmity have been satisfied. Accordingly, you have to inquire, What is the contract of employment that has been made ?—because it is only as additional to that contract and after the employee has entered into it, that statutory provision for superannuation is made at all. It appears to be clear, and I think it is admitted, that it rests with the employers to offer such terms of employment as they think fit. With regard to the determination of the service by notice or with regard to the age, beyond which in any case the service is not to continue, the Act contemplates no special form of contract. It is a matter of bargain between the parties.

Again, under s. 8 it appears to be in the discretion of the employing authority to reduce their staff when they think fit, and, if they chose to reduce their staff, whether temporarily or permanently, I do not see, as at present advised, how their discretion to do so could be questioned, unless it could be shown that they had been guided either by considerations wholly inappropriate to the discharge of their duties, or had in some way acted fraudulently or in bad faith. I think it follows, indeed I think it has been admitted, that by virtue of one or other of these two sections, it would be within the right of the employers either to contract for such terms of notice as would enable them to dismiss a man, when he began to approach dangerously near to the pensionable age, or to reduce him on the occasion of a general reduction of staff, when, as a person so soon likely to be pensionable, he would be the most proper subject for economy. These two things then are within the contemplation of the statute. In the first case there is the risk of his becoming incapable of discharging the duties of his office with efficiency by reason of permanent infirmity, before a notice of dismissal is given him, expiring while he is still at work, but, subject to this, the guardians could get rid of the man and prevent him from receiving his superannuation allowance, without any breach of the Act at all. In the latter case they would simply be

bound to pay back the aggregate of his contributions during the years of his service, not augmented by any interest or any other form of compensation. Virtually his contributions would have been a deposit of caution money. If the Act provides that these two things may lawfully be done, it is quite immaterial whether they are likely to be done or not, because I do not think the Legislature can be deemed to have expressed its will upon any implied assumption, that bodies of this kind will act in business matters in one way rather than in another. One asks oneself how it can be right to imply without the use of any express words, that a similar result, contractually and more beneficially produced, is contrary to the Act, because, instead of exercising extreme rights under ss. 2, 8, and 12 respectively, the two parties have come to an agreement, that there shall be no superannuation allowance and no deduction, but that the servant shall receive all that he earns and get nothing after ceasing to earn anything. I can see no reason why that should be so. I do not think it is correct to say that the mere use of the words "shall be entitled" is enough to import this unexpected and curious result, and I do not think that any public policy has been suggested, that would show this particular result to be what the Legislature contemplated. The contrary assumption—namely, that the Legislature did not touch the right to contract for a waiver or abandonment of benefits that might otherwise have been claimed, is neither contrary to public policy nor surprising in itself. To say that it would wreck the Act or stultify the Act is only another way of saying that, if the Legislature meant the Act to have the effect for which the respondent contends, a contract to the contrary would of course not carry out the intention of the Legislature, but this seems to beg the question first, and then to use the answer as a solution of the problem. Personally, I think it is not an unwholesome rule of construction (and construction is the whole of our task) to say that, just as we are bound absolutely by the language of the Legislature, so we must abstain from putting upon the Legislature anything that is not clearly what it has said, and for this very good reason,

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that it is so extremely apt to make judicial ideas, as to what is good for the public or within the vague confines of public policy, do duty instead of a literal and unimaginative interpretation of the Legislature's own words.

I therefore think, my Lords, that in this case it has not been shown that the statute is inconsistent with the contract that was made.

LORD PARMOOR. My Lords, I find myself in agreement with the motion made by the Lord Chancellor, and with the decision which has been come to in the Court of Appeal. I do not want to refer further to the decision of the Court of Appeal, except to say that, although I agree with the decision arrived at by all the three learned judges, I can see no argument on the other side, to that of Warrington L.J.

My Lords, in a case of this kind the only matter which we have to decide judicially is to ascertain, in accordance with the principles applied in cases of this sort, what the will of the Legislature is. The Legislature has expressed its will in the terms of the statute, and the task before us now is to construe that statute in order to see what the will of the Legislature was. In my opinion it is unnecessary to refer to any other statute. We can confine our attention to this Act of 1896.

The first section that I wish to refer to—namely, s. 2—goes a very long way by itself to establishing an imperative obligation upon the guardians which it is not competent for them to alter by means of a private outside contract. The words are very wide. I will not quote the actual words, but the substance is that it places an obligation upon the guardians to take certain steps, so that the officers and servants, under the conditions mentioned in the statute itself, shall be entitled in certain events to receive during life out of the common fund of the union a superannuation allowance, according to the scale laid down in the Act. The only exception mentioned in that section is "subject to the provisions of the Act," and when I look at the provisions of the Act—and I will call attention shortly to one or two

of them—I do not find any provision which suggests in any way that that obligation, which is imperative in its terms, can be got rid of, by means of a private arrangement with a particular officer or servant. And in the same way I think it is important (and the noble and learned Lord who has preceded me referred to it) with s. 2 to read s. 12. Just as there is a general obligation, subject only to the provisions of the Act, to provide a pension, so is there a general obligation, subject only to the same limitation—because s. 12 begins with the same words as s. 2—of an annual contribution from the officer and servant in the service or employment of the guardians of the union. My Lords, I should have considered those two sections as in themselves imposing a positive obligation on both parties, and that it would be inconsistent with an obligation of that kind to attempt to contract out of the pension terms of the Act. At the same time it appears to me that so far as the other sections of the Act are important, they all point in the same direction. I think s. 8 is a very proper statutory provision, that in the case of an officer or servant who, under the terms of that section, has not become entitled to a superannuation allowance, it is not a question whether the guardians desire to be beneficent or not (although I agree, myself, that in their administrative duties they might be relied on to take a fair judgment in questions of this sort), but there is a statutory regulation introduced which again, to my mind, is inconsistent with the idea of settling questions of this kind by private contract. Then as regards s. 10, I myself put very great weight on s. 10, and I approve of the view taken of that section by Warrington and Sargant L.JJ. Warrington L.J. says: "It seems to me to be too absurd to suppose that the Legislature had provided this inalienable provision for the retired servant, and yet left him at liberty, up to the moment before he retired, to deprive himself, by bargain with the guardians, of that provision." Sargant L.J. points out that the non-assignability is not only non-assignability to a stranger, or to a creditor, or to some outside person, but includes, in his view, non-assignability to the guardians

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themselves, and, if you take that construction of s. 10, it appears to me directly contrary to hold that, what is rendered inalienable by the Act as between the guardians and the officer or servant can be alienated in this case, even after the pension right had arisen, by private contract between the parties. In addition, too, I should put some weight on s. 15, because s. 15 provides, and very properly provides—to preserve the rights and interests of existing officers and servants—that they shall not be obliged to come under the terms of an Act that has been passed since the service as between them and the guardians had commenced. I think that is quite right and quite proper, but at the same time it would not be necessary if the same matter could be carried out by private contract. Existing officers and servants are given a statutory right to keep themselves outside the Act, and I think that in itself is an indication that what was meant in the general terms of this Act was a general scheme of pensions for officers and servants of the guardians. I do not, my Lords, put much weight on the amending Act of 1897, but it points in the same direction. Now, applying the ordinary rules of construction, I come to this conclusion, that it was the general intention of this Act to provide a system of pensions for all officers and servants, obligatory both on officers and servants and on the guardians. In addition to ss. 2 and 12, I have referred to other sections of the Act which all appear to me to point in the same direction, as excluding a right of contracting out. I have no doubt, after reading through the judgments more than once, that the judgments of the Court of Appeal were accurate.

LORD BLANESBURGH. My Lords, I feel strongly that the circumstances of this case are not in themselves favourable to the late plaintiff, who for four years took the benefit of a bonus granted on terms which on retirement it suited him to repudiate. I doubt, myself, whether, but for the condition in the matter of superannuation on which the bonus was in terms allowed, the full bonus would ever have been granted at all ; but except that I myself derive greater assistance

in reaching the conclusion from s. 15 of the Act of 1896, and from the amending Act of 1897, than does the Lord Chancellor, I agree with the motion made from the Woolsack, for the reasons given by my noble and learned friend.

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Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, June 17, 1926.

Solicitors for the appellants : *Reid, Sharman & Co., for Foyster, Waddington & Morgan, Manchester.*

Solicitors for the respondent : *Howard & Veneer.*

[HOUSE OF LORDS.]

COMMISSIONERS FOR EXECUTING OFFICE OF LORD HIGH ADMIRAL OF UNITED KINGDOM . . . . } APPELLANTS ;

AND

OWNERS OF STEAMSHIP CHEKIANG . RESPONDENTS.

H. L. (E.)* 1926 *June* 18.

Shipping—Collision—Damages for Detention—Warship—Non-profit earning Vessel—Collision Repairs and Owners' Repairs executed simultaneously—Measure of Damages.

The respondents' steamship collided with H.M.S. *Cairo*, a light cruiser, and damaged her. The respondents admitted liability for the collision subject to a reference to the Registry for the assessment of damages.

The *Cairo* was temporarily repaired at Hankow, and she then proceeded to Hong Kong for permanent repairs. She was shortly due for her annual refit, and after her arrival at Hong Kong the Admiralty decided to do both sets of repairs at the same time. The combined operations occupied about eight weeks, but the registrar found that the time properly allocated to the collision repairs was twenty days, and, in respect of the loss of the use of the *Cairo*, he allowed a sum of 100*l.* per diem, this sum being calculated on the basis of 5 per cent. per annum on the estimated capital value of the ship at the time of the collision :—

Held (1.), that the fact that the Admiralty took the opportunity of the docking required for the collision repairs to do the refitment repairs, which had not become necessary at the time of the collision, was not

* *Present :* VISCOUNT DUNEDIN, LORD SUMNER, LORD PHILLIMORE, LORD CARSON, and LORD BLANESBURGH.

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a ground for reducing the liability of the respondents to make good the damage caused by the collision, and that the registrar had rightly allowed damages as for the total deprivation of the use of the vessel for the twenty days.

Ruabon Steamship Co. v. *London Assurance* [1900] A. C. 6 applied.

(2.) That in the circumstances the registrar had not misdirected himself in assessing the damages on the principle of *The Greta Holme* [1897] A. C. 596.

Per Viscount Dunedin and Lord Sumner. In awarding damages in a collision action there is no absolute rule that the damages for the detention of a warship, or other non-profit-earning ship, are to be calculated on the basis of a percentage of the capital value of the ship at the time of the collision. Regard must be had to the character of the ship and the duties to be performed by her in relation to capital value.

Decision of the Court of Appeal [1925] P. 80 reversed.

APPEAL from an order of the Court of Appeal (Bankes and Atkin L.JJ. and Lawrence J.) (1), reversing an order of the President, which had confirmed the report of the registrar on a reference to assess damages.

The facts are fully stated in the report of the case in the Court of Appeal and are summarized in the headnote.

April 15, 16. *Sir Douglas Hogg A.-G.* and *Raeburn K.C.* (with them *Balloch*) for the appellants.

1. The fact that a ship is not a profit-earning ship does not disentitle the owner to damages for being deprived of the use of the ship, and in assessing the amount of the damages the registrar was not wrong in allowing a reasonable percentage on the capital value of the ship for the period during which she was detained in undergoing the collision repairs: *The Greta Holme* (2); *The Mediana* (3); *The Marpessa* (4); *The Surf* (5); *The Zoroaster* (6); *The Astrakhan* (7); *The Kingsway.* (8) In the case of a warship the measure of damages may be more difficult to ascertain, but that is not a reason for giving no damages: *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierdo y Castaneda.* (9)

(1) [1925] P. 80.
(2) [1897] A. C. 596.
(3) [1900] A. C. 113, 116.
(4) [1907] A. C. 241.
(5) (1910) Roscoe's Measure of Damages in Maritime Collisions, 2nd ed., App., Part III., p. 179.
(6) (1903) Unreported. Referred to in Roscoe's Measure of Damages, 2nd ed., p. 110.
(7) [1910] P. 172.
(8) [1918] P. 344.
(9) [1905] A. C. 6, 12.

[They also referred to *Admiralty Commissioners* v. *Steamship Valeria*. (1)]

2. The award of the registrar is not affected by the fact that the appellants, when effecting necessary collision repairs, took the opportunity of putting the vessel through her annual refit at the same time. *Ruabon Steamship Co.* v. *London Assurance* (2), where the *Vancouver* case (*Marine Insurance Co.* v. *China Transpacific Steamship Co.* (3)) is distinguished; *The Acanthus*. (4) The *Cairo* was dry docked solely to enable the collision repairs to be done, and the appellants, by taking advantage of the ship being in dry dock to do the refitment repairs, have not become liable to contribute to the dock dues. If it had been necessary that the refitment repairs should have been done at the same time then no doubt a liability to contribute would have arisen: *The Haversham Grange*. (5)

Dunlop K.C. (with him *R. F. Hayward*) for the respondents. The question of allowing as damages for loss of use of a warship a percentage on the capital value has never been before the Courts. That no doubt is the practice before the registrar, but it is submitted that the registrar was wrong in law in applying a hard and fast rule of practice in the circumstances. It is for the Admiralty to prove their case, but they have given no evidence of what use they would have had of the ship if she had not been damaged by collision. That being so, the Court of Appeal were right in sending the case back to the registrar to ascertain, in accordance with the ordinary principles of damages, what was the actual loss (if any) incurred by the Admiralty by the detention of this vessel. As to the second point, when it is shown to be reasonable to overhaul at the same time and unreasonable to overhaul at any other time, it follows that the Admiralty were getting a partial use of the vessel during the period of detention. That is a relevant factor in estimating the damages.

(1) [1922] 2 A. C. 242.
(2) [1900] A. C. 6, 9, 12, 17.
(3) (1886) 11 App. Cas. 573.
(4) [1902] P. 17.
(5) [1905] P. 307.

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Raeburn K.C. in reply. The registrar was not treating the percentage basis as a rule of law, but merely as a method of proof. The second point is concluded by the *Ruabon* case. (1)

The House took time for consideration.

1926. June 18. VISCOUNT DUNEDIN. My Lords, in this case the steamship *Cairo*, a light cruiser, was being employed in the China waters by the Admiralty when she had her stem injured by a collision with the *Chekiang*, for which collision the *Chekiang* is admittedly to blame. The occurrence took place on August 22, 1921, the *Cairo* being at that time at Hankow. There are no facilities at Hankow for permanent, although there are for temporary, repairs. Temporary repairs were effected at Hankow, but the *Cairo* sailed on September 2 for Hong Kong, where permanent repairs could be executed. The *Cairo*, according to Admiralty instructions, had to undergo an annual refit, and that refit was due to begin, unless unforeseen circumstances arose, on December 11, 1921. Accordingly, when the authorities found that the *Cairo* was necessarily in dock at Hong Kong for the purpose of making the permanent repairs rendered necessary by the collision, they decided that the annual refit should be anticipated and take place concurrently. In consequence of this decision the *Cairo* remained in dock from September 7, 1921, when it entered, until October 29, 1921. The Commissioners of the Admiralty having raised an action against the owners of the *Chekiang* for the damages occasioned by the collision, the defendants admitted the fault, and proceeded before the registrar and merchants for the assessment of damages. The registrar found the facts as above quoted, and, further, found that the collision repairs demanded a detention of twenty days. The plaintiffs claimed the cost of repairs, survey fee and superintendent's office and incidental expenses ; all those items were admitted. But they further claimed thirty-six days' loss of the use of the *Cairo* at 100*l.* a day,

(1) [1900] A. C. 6.

this sum representing interest on the capital value of the ship at the time of the collision, and pay and allowances of the officers and men for the like period, these being the actual amounts expended. The registrar allowed for loss of time for twenty days only at 100*l.* a day, and allowed a sum in respect of the pay and allowances of the officers and crew for that period after making a deduction in respect of the work done by them in connection with the refit. The defendants objected, but the learned President confirmed the report. On appeal the Court of Appeal recalled the judgment and remitted to the registrar for reconsideration of the sum due. Against that judgment the present appeal has been brought.

My Lords, it seems to me that there are here two questions, and two questions only, to be considered. The first is, was it right for the registrar to allow damages as for the total deprivation of the vessel for the period of twenty days during which the vessel was undergoing collision repairs, while, at the same time, refit repairs were going on? The second, if the first be answered in the affirmative, is whether the damages have been properly calculated?

As regards the first question, I think it is concluded by authority of a case in your Lordships' House. I refer to the case of *The Ruabon*. (1) In that case a ship having been put into dock for repairs rendered necessary by a collision, the owners took advantage of her being there to have her classification made, there being at the time no actual necessity for having the classification made. The underwriters who were liable for the damages ensuing on the collision claimed to have a contribution from the owner from the dock dues. This was refused, and the judgment was put on the general proposition, that where the damaged vessel is perforce kept in dock for the expense of which detention the wrongdoer who caused the damage is liable, no liability to contribute is created by the fact that the owner takes advantage of the situation to do what he pleases with his own vessel, such act not interfering with the necessary operations for which the

(1) [1900] A. C. 6.

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wrongdoer is liable. This decision was applied by Sir Francis Jeune in *The Acanthus* (1), where, a vessel being dry-docked for collision repairs, the owner took the opportunity to fix bilge keels on the vessel, that not being a work of necessity, and was held not liable to contribute towards the dock expenses.

If the act of the owner was of necessity it would be otherwise. It follows, in my opinion, that inasmuch as it is found in fact that there was no necessity to make the refit, the Admiralty were entitled to take advantage of the vessel being in dry dock without being called on to contribute to the expense of docking or to forego the payments in full to which they were entitled as for the loss of the use of the vessel for the period of detention due to the collision during which the vessel was rendered unfit for her active service. This period, as already mentioned, was fixed at twenty days.

There remains the second question, as to whether the damages had been properly calculated. My Lords, in the case we are about to decide (2) I have discussed the subject of the calculation of damage, and I shall not repeat what is there said. In the present case the registrar and merchants, acting as a jury, might have arrived at a certain sum based on a calculation of a percentage of the actual value of the ship. There is no absolute rule enjoining such a calculation. I can imagine in some circumstances it would bring out an extravagant sum, but in the present case I cannot say that it has that effect. I do not consider that the registrar has worked on any absolute or fixed rule, and, viewing the award as a jury award, I do not think we should interfere with it. The expenses of the officers and men have not been allowed in full.

I move to recall the judgment of the Court of Appeal and to restore the judgment of the President, which confirmed the report of the registrar. The respondents to pay to the appellants their costs in this House and in the Courts below.

LORD SUMNER. My Lords, I agree. It is with lively satisfaction that I concur with the noble and learned Viscount

(1) [1902] P. 17. (2) *The Susquehanna*, post, p. 655.

in thinking that the time has come, when your Lordships may, without any sacrifice of dignity, devote some short time to the rules applicable to the measure of damages in collision actions. After all, little as this question has engaged the attention of the Courts, parties take more interest in it than in any other issues in litigation, and they are not alone in thinking that it is one in which platitudes and rules of thumb are no good. Damages may be a "jury question," that is a question of fact for the jury, if there is one, but they must be measured under a proper direction, as to what the law requires. To say, as judges have come as near to saying as decorum permits, that juries must find a figure as best they can and escape criticism by being anonymous and dumb and accordingly proof against everything but "perversity," is a poor position in which to leave the matter. In this class of case, there is an opposite system of practice, and, in lieu of a jury, a highly important and experienced official of the Court acts judicially in the first instance. He has to arrive at a conclusion without any previous directions upon the law from the learned judge, and then to state that conclusion in writing and, unless he risks such a criticism, erroneous as I venture to think, as was passed on him in this case by the Court of Appeal—namely, that he had proceeded on a rule of thumb, as if it was binding law in all cases—he must give the legal reasons, which support his conclusion. The measure of damages ought never to be governed by mere rules of practice, nor can such rules override the principles of the law on this subject. I find the following passage in the learned registrar's excellent work on this topic (2nd ed., p. 106), alluding first to *The Mediana* (1) and next to *The Marpessa* (2): "The House of Lords, though it has established a rule, has not given any practical assistance towards the difficult question of formulating a standard of damages in cases to which such a rule is applicable, which difficulty was chiefly responsible for the doubt as to the propriety of a claim for demurrage by a non-trading body. Indeed, the tribunal ostentatiously put this difficulty on one

(1) [1900] A. C. 113. (2) [1907] A. C. 241.

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side, stating in this last decision that, though it did not agree with the Registrar's Report, it would not vary its conclusions."

My Lords, I acknowledge with contrition the justice of these strictures. In *The Greta Holme* (1) Lord Watson says: "The data for estimating the amount of substantial damage are not precise. In cases like the present that difficulty is sometimes inevitable and is of common occurrence; but it is a difficulty which can be easily and is often satisfactorily overcome by a jury under proper directions. Personally I have a dislike, which I have reason to believe is shared by other judges, to the task of assessing damage."

In *The Mediana* (2) Lord Halsbury says: "What right has a wrongdoer to consider what use you are going to make of your vessel? . . . . The broad principle seems to me to be quite independent of the particular use the plaintiffs were going to make of the thing . . . . except . . . . when you are endeavouring to establish the specific loss of profit, or of something that you otherwise would have got which the law recognizes as special damage. . . . . When we are speaking of general damages no such principle applies at all, and the jury might give whatever they thought would be the proper equivalent for the unlawful withdrawal of the subject-matter then in question."

Lord Loreburn observes in *The Marpessa* (3): "The plaintiffs were entitled to put their case in another way. They might say: The cost to us of maintaining and working this dredger, while it is working, amounts to so much per day, and its depreciation daily amounts to so much more. We take the total daily sum which it costs us as a fair measure of the value of its daily services to us. Those services are at least worth what we are habitually paying for them year after year, including what we sacrifice in depreciation." I would point out that, as examination of the reports of the case before the President and the Court of Appeal will show (4), this was not by any means the way in which the plaintiffs

(1) [1897] A. C. 596, 604.
(2) [1900] A. C. 113, 117, 118.
(3) [1907] A. C. 241, 244, 245.
(4) [1906] P. 14, 95.

had actually put and proved their case. Lord Loreburn proceeds: "There is a confusion in the registrar's award in these respects, and also in regard to general damage in the circumstances of this particular case. . . . . In my opinion, though there is error in the registrar's report, there is no case for the interposition of this House. We cannot correct every minute mistake." It must be admitted that the learned registrar, as the tribunal before whom the assessment of damages takes place, did not get very ample guidance from these declarations.

My Lords, when the *Chekiang* ran into the *Cairo* she imposed on the Admiralty, as the direct consequence of this wrong, the necessity for docking the *Cairo* at Hong Kong during the repair of the collision damage. Why should not the *Chekiang* pay for that docking? Her overhaul was not then due. It had not been determined upon for that time, and the programme of overhauls was itself liable to alteration. The overhaul imposed no extra burden on the *Chekiang* when it took place; in fact, the dock charges are claimed only to the end of the collision repairs and not till the *Cairo* left the dock. There is abundant authority for saying that the fact, that the owners of an injured ship take the opportunity of the docking required for collision repairs to do work on their own ship, which had not already become necessary at the time of the collision, nor was brought about by the owners' negligence contributing to the collision, is no ground for reducing the wrongdoer's liability to make good the damage his wrongdoing has caused. It is not, like *The Haversham Grange* (1), a case of both to blame and of a second collision following a first one, which had already made docking inevitable. The proposition of Lord Macnaghten in *The Ruabon* (2) no doubt is applicable—namely, "There is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it"—but otherwise the present matter depends on the law relating to liability for damage caused by wrongdoing, not on anything arising out of a contract of indemnity,

(1) [1905] P. 307. (2) [1900] A. C. 6, 15.

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and in this case at any rate the dock dues were not a "common factor." Nor is there here any question of minimizing the damages. The object of that principle is to prevent a tort-sufferer from recovering for damage, which is really self-inflicted, because with reasonable effort he could have avoided it. This does not extend to investing the tortfeasor with a right to call on him to do things which do not follow from the collision, in order to diminish liability for the wrong.

The precise question therefore comes to be this. Was there evidence before the learned registrar, which justified him in law in measuring as he did, that part of the claimants' damage, which consisted in loss of the use of the *Cairo* during the time occupied in repairing the collision damage? He took the *Cairo's* original cost, written down for two years' depreciation to the date of the collision, and allowed 5 per cent. per annum on it.

Such a measure was applied with approval to craft in non-trading civil employment in *The Marpessa* (1), though neither the rate of interest nor the rate of depreciation nor the mode of reckoning it was there defined. In the Admiralty Registry, as instances quoted in Mr. Roscoe's book show, varying rates of interest have been allowed according to circumstances, and this ought also to be done when depreciation is reckoned. I think, therefore, it becomes crucial to ask whether, and if so, on what ground, such a calculation can be applied to a King's ship.

That a tort-sufferer is not to go short of compensation for damage at a tortfeasor's hands, merely because he does not trade for profit, is well settled. Equally little can the tortfeasor escape, because his wrong is done to a King's ship. This has been recognized for some fifteen years in *The Surf* (2) and other cases in the Registry, and in *The Astrakhan* (3) by Deane J. The plan, on which the damage is to be calculated, is a different matter. King's ships differ among themselves very widely and, even as a class, they

(1) [1907] A. C. 241.
(2) Roscoe's Maritime Collisions, Measure of Damages, 2nd ed., p. 179.
(3) [1910] P. 172.

differ as much from the dredgers and lightships of the Mersey Docks and Harbour Board as these do from common tramps. What then is the principle on which the present calculation was made, and is it applicable to King's ships in general and to the *Cairo* in particular? *The Marpessa* (1) was a decision, which was consequent on *The Mediana* (2), and *The Mediana* professed to follow the "principle" of *The Greta Holme*. (3) The only principle as to this measure that I can find there stated is in Lord Herschell's words: "How can they the less be entitled to damages because, instead of hiring a dredger, they invested their money in its purchase? The money so invested was out of their pockets, and they were deprived of the use of the dredger, to obtain which they had sacrificed the interest on the money spent on its purchase. A sum equivalent to this, at least, they must surely be entitled to." To this I would add Lord Loreburn's words above quoted: "Those services are at least worth what we are habitually paying for them year after year, including what we sacrifice in depreciation."

Interest is, in any case, a thing that has little to do with non-commercial transactions and, apart from cases of contract, is always a highly fictitious factor in calculations. Further, a calculation based on the cost of construction of a ship, written down to the date of the collision, is, of course, much more appropriate to the case of a total loss than to demurrage during repair, and although, by manipulating the percentage of depreciation and the percentage assumed for annual value, a flexibility is obtained, which theoretically is almost infinite, the calculation must be a very uncertain test of the true daily value of the user lost. The assumption, on which this calculation seems to rest according to the two passages above quoted, is that in a well conducted business the machinery, which you buy, will generally be found in use to be worth what you spent on it, and this is emphasized by the fact that Lord Herschell's proposition was not really a statement of anything that the Mersey Docks and Harbour Board had

(1) [1907] A. C. 241. (2) [1900] A. C. 113.
(3) [1897] A. C. 596, 605.

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actually sacrificed, but was rather directed to the position of a private firm, trading for profit with its own capital. I think, however, that, when one gets away from personal trading, this assumption may quickly become unsound. For a dredger, working at a limited task under settled local conditions, or a lightship always discharging the same duty in the same place, it may well be that an admirably managed dock authority, aided by the best engineering advice, can insure that they get full value for what they spend, and may reasonably reckon both depreciation and annual value by dividing expense into the prospective life of the vessel. For some Admiralty craft the same assumption may reasonably be made, for tugs for example, and oilers, or harbour launches and ferry boats, or floating docks, or even it may be for the old Indian troopships. There is a regularity of duty and a close analogy to commercial undertakings in these cases, that justify the assumption. Beyond such craft the analogy tends quickly to vanish. There is no presumption that ships of war are worth to the State what was spent on building them, or that their daily user is worth the cost of running them, for outlay on the Navy is not a matter of commercial investment of money but of State policy. What, for example, is the daily value of the user of a mine-layer or a submarine in time of peace, or what can be made of interest on the capital laid out on the guns and armour of a battleship ? In ships of war fashion changes, or perhaps I should say the science of war advances ; ships are built in a hurry or when prices are high, or are continued in service when they are obsolescent or have proved to be failures, and this for reasons of policy and not of economics. Much depends on the kind of ship : more on the existence of profound peace or the imminence of the outbreak of war. In the last event the value of the time, when collision makes a man-of-war unavailable, may truly be at once vast and inestimable ; in some of the others the value of the user may really be no more than that of floating accommodation for officers and crew, who have among other things to be kept under discipline and busy. To all these matters in the appropriate case the registrar would have

to direct his mind. No formula can fit them all and no formula could fail to vary in regard to its factors from time to time. The practical question is whether it can be said that, in applying the principle of *The Greta Holme* (1) to the case of the *Cairo*, the learned registrar misdirected himself in law.

My Lords, on the record the learned registrar had very little evidence about the *Cairo* before him, but there are two things always to be borne in mind about proceedings in the Registry. The great experience of the registrar and the knowledge of the merchants, who assist him, make evidence on many topics quite superfluous, and the participation in the proceedings of experienced counsel constantly justifies the conclusion that, by tacit if not by express consent, statements are accepted of which no formal proof appears on the note. I think that on the present point there was a large measure of consent, nor was this much contested. It seems to me reasonable to conclude that, whether by the knowledge which he had acquired in the course of his duties or by the advice of the gentlemen who assisted him, or by the acquiescence of counsel specially familiar with such matters, or by all of these, the learned registrar was warranted in assuming that the *Cairo*, a ship about two years old, performing duties and designed to perform duties (inter alia) which appear to have consisted in patrolling the Yangtse Kiang near Hankow and in giving moral rather than material support to British interests, was doing work for which the outlay upon her was economically well designed, and that in allowing a rate of interest not I think excessive upon what is really a wasting security, he was committing no error in law.

I am of opinion that, in the present case, there is no ground for interfering with the conclusion of the learned registrar, but I think that, except in cases very strictly comparable with the present case, or in cases where admissions are made, the Admiralty should be required, as part of their claim, to give evidence of the character of the ship, to explain what her duties are and the true relation of the original cost to her

(1) [1897] A. C. 596.

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duties at the time of the damage, and so to enable a clear judgment to be formed of the appropriate rates of depreciation and of interest. I think also that the limit of comparable cases will soon be reached, and that beyond it some modified calculation will have to be found.

LORD PHILLIMORE. My Lords, public bodies who are owners of ships employed in local public service may, when their vessels have been injured by collision, recover, among other sums, damages for their detention while under repair, although no gain which could be measured in money accrues to such bodies by the use of their ships or is lost by reason of their being put out of action.

This has been decided by your Lordships' House in three cases: *The Greta Holme* (1); *The Mediana* (2); and *The Marpessa*. (3)

It has not yet been settled by your Lordships' House that the same principle extends to men-of-war and to Sovereigns as owners of men-of-war. But this step has been taken in the Admiralty Division in the reported case of *The Astrakhan* (4), and, as your Lordships have been informed, in several unreported cases.

Men-of-war are not built or commissioned or put on their station except for purposes of utility to the State which owns them; and the principle which your Lordships have applied to local public bodies seems logically to extend to the Crown and to other Sovereigns, and I presume that your Lordships will take this opportunity of giving your sanction to the practice which has been followed in the Admiralty Division. I might add that it seems to have been anticipated by Lord Halsbury in the case of *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierdo y Castaneda* (5) that such would be the case.

This determines the first point under consideration in the case of the *Chekiang*.

(1) [1897] A. C. 596.
(2) [1900] A. C. 113.
(3) [1907] A. C. 241.
(4) [1910] P. 172.
(5) [1905] A. C. 6.

A period of twenty days has been fixed by the registrar as the probable time which repairs to H.M.S. *Cairo* for the damage caused by the collision would take. He has not allowed for the period whilst she was undergoing temporary repair at her station at Hankow, because he conceives that even in her damaged state she sufficiently represented the power of Great Britain; and no claim appears to have been made for the two days lost in steaming to Hong Kong, where her permanent repairs were done. The registrar has estimated that these repairs at Hong Kong would, in any event, have taken twenty days, and for this estimate there is sufficient warrant in the evidence, and your Lordships have not had any serious challenge of his finding on this point.

But it is contended on behalf of the owners of the *Chekiang* that in reality the repairs of the *Cairo* caused no detention, because the opportunity of her being in dry dock was taken for submitting her to the periodical overhaul to which ships in His Majesty's Navy are submitted, and this overhaul ran pari passu with the repairs, and lasted longer than the twenty days which the repairs in normal course would have taken. This contention has been accepted by the Court of Appeal.

It appears that the usual rule is that this periodical overhaul or refit should take place at intervals of twelve months, that the period of twelve months would have expired at the end of November or early in December, 1921, and that the *Cairo* went into dry dock for her repairs on September 6. But it is not a rigid rule that directly on the expiration of a twelve months' period the refit should begin. All such matters are subject to the exigencies of the public service and the orders of the Commander-in-Chief of the station. The time is approximate only.

It was found by the registrar and must now be taken to be the case that the *Cairo* was not sent to Hong Kong with a view to this refit, and that the idea of combining the repairs and refit was not accepted by the authorities till after she had got to Hong Kong. It was not a case where collision or no collision she would have gone into dock then for her refit.

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It is a case where, the going into dock for repairs being necessary, the authorities on the whole thought it convenient to advance the period of refit (though that advance is itself open to some objection) and combined the two operations, or it may be said superadded the refit on the repair.

This being so, there is no question that the detention for twenty days was due to the collision, and all that can be said on behalf of the owners of the *Chekiang* is that the Admiralty employed the time profitably and thereby saved a part of the period which would at some later date, if no accident had happened and nothing special had supervened, have been taken up for a refit.

My Lords, it seems to me, as indeed to all your Lordships, that a wrongdoer cannot claim to have the damages given against him reduced by any such consideration. The principle laid down by your Lordships' House in *Ruabon Steamship Co.* v. *London Assurance* (1) applies, notwithstanding the way in which the Lords Justices have distinguished it. The decision of Sir Francis Jeune in *The Acanthus* (2), where advantage was taken of the vessel being in dry dock to add the improvement of bilge keels, and yet the whole period of detention was allowed against the wrongdoer, was, I think, sound.

The decision in the Court of Appeal in the case of *The Haversham Grange* (3), when rightly understood, is an authority to the same effect. In that case the injured vessel was the subject of two collisions, in both of which the other ship was the wrongdoer, and the repairs occasioned by the second collision proceeded simultaneously with and took a shorter time than the repairs due to the first. In the action against the second ship, a claim was made for demurrage during the time taken for the repairs due to the second collision, and the Court expressed itself so strongly against this claim that it was given up. But it was not the contention of anybody that the owners of this injured vessel should not have this period of detention. The claim against the second

(1) [1900] A. C. 6. (2) [1902] P. 17.
(3) [1905] P. 307.

ship was disallowed, because the first ship had got to pay it. The owners of the injured ship were entitled to claim the full period of detention against ship No. 1, though they utilized part of it for repairing damage caused by ship No. 2.

It is true that the Court of Appeal did make ship No. 2 pay a proportion of the charges due for the use of the dry dock; but the Court distinguished this charge from the charge for detention on a ground which it is not very easy to appreciate that the charge for the dry dock must be considered as part of the charge for repairs. This point may some day have to be reconsidered; but on the question of detention, the case is an authority in favour of the Admiralty.

My Lords, I think that the point may be put quite shortly as follows: If a vessel has got to go into dry dock for a periodical survey for class or in the case of King's ships by the practice of the Admiralty, or to repair previous damage, her detention for repairs due to some collision which occurs after the previous damage or after the determination to put her into dry dock has been made, will not be a charge against the wrongdoer; otherwise it will. This covers the second point in the case.

The third point is as to the amount of compensation estimated day by day during the twenty days. The registrar has arrived at this in accordance with the practice which apparently has obtained in other similar cases. There being no other measure to guide him, he has allowed interest at a certain rate upon the estimated value of the vessel, this value being arrived at by taking prime cost and deducting depreciation from the time when she was launched.

As I have ventured already to observe, ships of war are not built, commissioned or put on station for idle purposes, and it is to be presumed that they are worth to the State which owns them what it has cost the State to construct and to run them.

To this interest the registrar has added a further sum for the pay and allowances of the officers and crew, after making a deduction which must be rough and ready, for their assistance during the work of repair.

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It might be observed with some force that his deductions here are hardly large enough. I do not, for instance, see that he has reckoned for the fact that at any rate the commissioned and higher warrant officers were entitled to at least halfpay whether actively employed or not. But the deductions to be made would be small, nor have they been seriously insisted upon at this stage of the case. From the nature of things, both items of the estimate must be arrived at by what is, to use the old Admiralty phrase, a judicium rusticum, and I think that your Lordships need not interfere, and that the registrar's report, confirmed as it was by the President, should stand, and the judgment of the Court of Appeal should be reversed.

LORD CARSON. My Lords, I concur.

LORD BLANESBURGH. My Lords, I concur.

Order of the Court of Appeal reversed, and order of the President restored. The respondents to pay the costs in the Court of Appeal, and also the costs of the appeal to this House.

Lords' Journals, June 18, 1926.

Solicitor for the appellants: *Treasury Solicitor.*
Solicitors for the respondents: *Waltons & Co.*

[HOUSE OF LORDS.]

COMMISSIONERS FOR EXECUTING OFFICE OF LORD HIGH ADMIRAL OF UNITED KINGDOM . . . . } APPELLANTS;

AND

OWNERS OF STEAMSHIP SUSQUEHANNA . . . . . } RESPONDENTS.

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THE SUSQUEHANNA.

Shipping—Collision—Measure of Damages—Loss of Use of Admiralty Oil Tanker—Substitution of stand-by Vessel—Vessels exclusively engaged on Admiralty Service but of a Class which are sometimes let on Hire—Basis of Assessment of Damages.

The *P.*, an oil tanker belonging to the Admiralty and engaged in supplying oil fuel to the Fleet, was damaged in a collision with the respondents' steamship. The respondents admitted liability, and the damages were referred to the registrar and merchants for assessment. The Admiralty owned a number of tankers, some of which they from time to time chartered for commercial purposes, but it was admitted that neither the *P.* nor the *B.*, which took her place while she was being repaired, would have been chartered. The registrar awarded the Admiralty in respect of loss of use of the *P.* during the time occupied by the repairs a sum based on her commercial value if she had been let on hire—namely, 200*l.* per diem; but the President remitted the case to him for reconsideration on the ground that he had adopted a wrong basis of assessment:—

Held, that the damages ought not to be assessed on the footing that the *P.* should be treated as a ship to be let out on a mercantile charter, but should be assessed on the principle of *The Greta Holme* [1897] A. C. 596 with such rates of interest and depreciation as the evidence might justify.

The principle upon which damages are to be assessed in a collision action in respect of the detention of the injured ship during repairs considered.

Decision of the Court of Appeal [1925] P. 196 affirmed.

APPEAL from an order of the Court of Appeal affirming an order of the President referring back a report of the registrar for reassessment of one of the items in a claim for damages. (1)

* *Present:* VISCOUNT DUNEDIN, LORD SUMNER, LORD PHILLIMORE, LORD CARSON, and LORD BLANESBURGH.

(1) [1925] P. 196.

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The action arose out of a collision on November 29, 1920, at Danzig between the respondents' steamship *Susquehanna* and the *Prestol*, an oil tanker belonging to the Admiralty and engaged in supplying oil to the Fleet. The respondents (defendants) admitted liability, and the damages were referred to the registrar and merchants for assessment. In consequence of the collision the *Prestol* was replaced by the *Belgol*, another oil tanker belonging to the Admiralty.

The facts are fully stated in the report of the case before the President and the Court of Appeal, and are summarized in the headnote.

The registrar assessed the damages to be allowed for the detention of the *Prestol* during the time occupied for repairs on the footing of the amount which she could have earned if she had been let on hire.

The President referred the report back to the registrar for reassessment on the ground that he had proceeded upon a wrong basis, and the Court of Appeal (Bankes, Scrutton and Atkin L.JJ.) affirmed his decision.

1926. April 16, 19. *Sir Douglas Hogg A.-G.* (with him *Raeburn K.C.* and *Balloch*) for the appellants. Inasmuch as the injured ship was a vessel suitable for commercial use and could be profitably chartered if not in use by the Admiralty, the registrar in assessing the damages due to the Admiralty for the deprivation of the ship was right in basing his report on what the ship would have been capable of earning if she had been let out on hire. In such a case the loss was not necessarily represented by interest on the capital value. The wrongdoer has no right to consider what use the Admiralty would make of the vessel. The broad principle upon which damages are assessed is independent of the particular use which the plaintiff was going to make of the thing taken, except of course in a case of special damage: *The Mediana.* (1)

Dunlop K.C. and *Stenham* for the respondents. If this ship had not been damaged by collision she would not have

(1) [1900] A. C. 113, 117.

been let out on hire, but would have continued to supply oil to the Fleet, and the Admiralty would not have let out on hire any other of their oil tankers. Therefore in the circumstances the loss of hire which the Admiralty are claiming is a wholly irrelevant consideration. The Admiralty were not concerned with hire, but with supplying the needs of the Navy, and the actual service of the vessel at the time of the collision precluded the possibility of hire. They ought to be recouped the damages they have actually suffered, and those damages are capable of being assessed. *The Greta Holme* (1) and the cases which followed it laid down no fixed measure of damages, but they did lay down the principle that the withdrawal from service of a vessel rendering a useful service was a factor in estimating the damages. The true method is to look at the use which the Admiralty would have made of the ship if there had not been a collision and to evaluate that loss.

[They also referred to *The City of Peking* (2); *The Bodlewell* (3); *The Clarence* (4); *The Black Prince* (5); *The Argentino* (6); *The Marpessa* (7); *The Kingsway* (8); *The Valeria* (9); *The M. J. Hedley.* (10)]

Raeburn K.C. in reply. Here is a service which has to be performed by vessels of a commercial character. If a vessel is withdrawn from that service, why should not that loss be measured by what the Admiralty would have had to pay in the market for the hire of another vessel? In this case the Admiralty had a margin which was valuable in the market, and they have been deprived of that margin. *The Bodlewell* (3) is inconsistent with decisions in this House, and has always been regarded with very grave suspicion.

The House took time for consideration.

1926, June 18. VISCOUNT DUNEDIN. My Lords, the *Prestol* was an oil tank steamer belonging to the Admiralty,

(1) [1897] A. C. 597.
(2) (1890) 15 App. Cas. 438, 442.
(3) [1907] P. 286.
(4) (1850) 3 Wm. Rob. 283, 285.
(5) (1862) Lush. 568, 573.
(6) (1888) 13 P. D. 61.
(7) [1907] A. C. 241.
(8) [1918] P. 344.
(9) [1922] 2 A. C. 242, 248.
(10) (1905) Unreported. See Roscoe on Damages (2nd ed.) p. 98 n.

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and was being used to supply the needs of the oil-driven ships of the British Navy which were stationed in the Baltic. Whilst on this service she was injured in collision with a steamer called the *Susquehanna* near Danzig. It was admitted that the *Susquehanna* was to blame for the collision. In consequence of the injury the *Prestol* had to be sent home to Rosyth. The repairs occupied thirty-two days. The place of the *Prestol* was filled by the *Belgol*, another oil tank steamer belonging to the Admiralty, which, for that purpose, was withdrawn from her service on the Clyde. The owners of the *Susquehanna* admitted liability to pay (1.) for the necessary repairs, (2.) for the pay and victualling of the crew of the *Prestol* during the period of repairs, and (3.) for survey and office expenses. But the Commissioners of the Admiralty further claimed a sum of 225*l.* a day for the period of thirty-two days. This was not admitted by the owners of the *Susquehanna*, and the present action is as to that sum. The matter was in the ordinary course remitted to the registrar and merchants; they, having regard to the fact that if the *Prestol* had been let on a time charter she would have earned a sum slightly less than 225*l.* a day and also to the fact that she was in dock, where she was secure, allowed an overhead sum of 6400*l.* as damages for the detention of the *Prestol*, that is to say, at the rate of 200*l.* a day. The facts on which they based their judgment were these: There is a good commercial demand for oil tank ships, and they held that if the Admiralty had gone into the market and offered an oil tanker of the class of the *Belgol* for hire they would have got it taken on these terms. On appeal to the President, that learned judge referred the case back to the registrar and merchants. He held that the naked fact that a vessel of that sort could, if let out, have earned the money was not per se a sufficient reason for finding the defendants liable in that sum, but that various other elements fell to be considered. On appeal the Court of Appeal unanimously upheld the judgment of the learned President, and the appeal has now been taken by the Admiralty to your Lordships' House. The actual question

for decision is therefore only whether the judgment referring back the case to the registrar for further consideration should stand, or whether the registrar's award of 200*l.* a day should be confirmed simpliciter; but inasmuch as the decision involves the general question of the proper method of calculating damages in such cases, it will, I think, be right that your Lordships should express your opinion on the principles on which such cases should be decided.

As a preliminary to any opinion which I would wish to give it will, I think, be well to see exactly how the authorities stand which have received the imprimatur of this House and are consequently binding upon us to-day. It would not, I think, serve any useful purpose to cite other decisions where the ground has been covered by the decisions in this House. The first case that need be quoted is *The Greta Holme*. (1) That case laid down that damages were due for the period during which a ship was rendered useless, even though the ship was not a ship of the kind which could secure commercial employment and earn consequent reward. That, and that alone, was the true point of the case. It is true that a sum was then fixed, but it was fixed by your Lordships much as a jury would fix it. The *Greta Holme* was a dredger. Her services were lost during the period which was occupied in her repair. She could not be, and was not, replaced by any other dredger. There was evidence that if any one had had a dredger of the same sort he could have let it out at the rate of 100*l.* a day. The dredger was disabled for fifteen weeks. Their Lordships, really acting as a jury, assessed the damages at 500*l.*

The next case was *The Mediana*. (2) The *Mediana* was a lightship used by the Mersey Docks and Harbour Board for the lighting of the Mersey. They had need of four lightships, but they kept six; one of the extra ones, namely, the fifth, was used when a periodical overhaul of each of the four was undertaken. The other, or sixth, was kept as an extra one for contingencies. The result was that, one being injured, No. 6 was brought into play and the Mersey Board

(1) [1897] A. C. 596. (2) [1900] A. C. 113.

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were put to no extra expense. It was not a case like that of the *Greta Holme*, of the work of the authority being partly suspended. The Board claimed 4*l.* 4*s.* a day for the deprivation of the services of the lightship which had been put hors de combat by a collision for which the defendants were responsible. Phillimore J., before whom the action depended, held that he was bound by four authorities in Admiralty to find nothing due. This was admittedly so unless *The Greta Holme* (1) had displaced the earlier authorities. He held that it did not, looking to the difference of circumstances as above described, but his judgment was reversed by the Court of Appeal and that judgment was upheld by this House. They held that *The Greta Holme* (1) did apply. The sum awarded, however, was taken as admitted, so that there was no discussion in either the Court of Appeal or in this House on the precise principles upon which the sum awarded was fixed. It was taken as if it had been found by a jury. Nevertheless, Lord Halsbury L.C. gave a long opinion on the general question of the ascertainment of damages. I analyse his opinion as follows: Small damages are not synonymous with nominal damages; damages which are not nominal may be either small or large; no exact rules for the valuation of damages can be given; special damage must be specially proved, but general damages only admit of such evidence as is in the circumstances available, and the amount becomes a jury question; depriving a person of the use of his chattel is a ground for real and not for nominal damages. I am not here concerned with that part of his judgment which explains and distinguishes the judgment in *The City of Peking*. (2)

Then came the case of *The Marpessa*. (3) This was the case of a dredger employed by a harbour board, and the point of dispute was what allowance was to be made for the days during which, owing to the necessary repairs due to the collision, the dredger was hors de combat. It was not replaced during that time by any other dredger, and no direct pecuniary loss could be proved. The claim as made was for 102*l.* a

(1) [1897] A. C. 596. (2) 15 App. Cas. 438. (3) [1907] A. C. 241.

day, which was based on a theoretical calculation which first of all took what had been paid in the past for another vessel which had been hired, and, adding the expenses of running, brought out an owner's profit of 27 per cent. after allowing 7 per cent. for depreciation. Then, applying the same method to the dredger in question and taking the original cost as the sum on which depreciation was to be calculated, the sum of 102*l.* per day was arrived at.

The registrar refused to accept this method, and dealt with the claim in much the same way as a jury would have done. He reduced the amount to 35*l.* a day. In doing so he made his own calculations, in particular allowing 7 per cent. to cover establishment charges, owner's profit and general damage, and calculating that 7 per cent. not on the original value but on the depreciated value of the vessel. His award was upheld by the President, by the Court of Appeal and by this House, Loreburn L.C. pointing out that in some respects the judgment was wrong, e.g., in calculating for owner's profit; in others inadequate, e.g., in taking the upkeep as what it was in dock instead of what it was on service, but with the registrar's decision, as a jury finding, he would not interfere, as he did not see that it was based on principles that were absolutely wrong.

My Lords, I think that the result of the decisions may be stated in the following propositions:—

(1.) There is no difference in this matter between the position in Admiralty law and that of the common law, and the common law says that the damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act.

(2.) If there be any special damage which is attributable to the wrongful act that special damage must be averred and proved, and, if proved, will be awarded.

(3.) If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question.

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(4.) For a jury question no rigid rules, or rules that apply to all cases, can be laid down, but in each set of circumstances certain relevant considerations will arise which, were the matter before a judge, it would be the duty of the judge in the case to bring before the jury. Now the registrar and merchants are not a jury; in one sense they have the advantage of a jury, for they have great experience, whereas a jury may be composed of persons who never had the opportunity of being in a case before the case in which they are called. None the less, the functions of the registrar and merchants are those of a jury. That being so, I consider that I am doing no despite to their experience, which I cheerfully admit, if in this case I make to them the same class of remarks as I should make if I had a jury before me.

I therefore come straight to the circumstances of the case. This is not a case where special damage has been attempted to be proved. If it could have been shown that the disabled oil tanker had, by contract, been let to some party at a stipulated rate for the period during which it was disabled, or that owing to its disablement it had missed a contract, then the terms of the contract it had secured or would have secured would have served rightly as the basis of the sum to be allowed as damages.

This is where I think the registrar went wrong in his original judgment. He took it as if there had been proof of special damage, but there is nothing of that sort in the case; the Admiralty were able to supply the gap made by the accident out of their resources. That does not mean that they are not entitled to any damages. If their fleet were sufficient to provide a stand-by, then the expenses of keeping that stand-by may fairly be taken into consideration. Such expenses mean not only the daily upkeep but something representing the amount of capital which had been parted with in order to have another ship, but the initial figure of cost does not necessarily represent that capital. Not only has there been necessary deterioration by lapse of time, but a vessel's condition may not be worth what was originally paid for it, quite apart from the deterioration. All these

are mere considerations; the registrar must do his best to allow a just but not an extravagant figure, and compensate, as far as money can do, the detriment which was in the whole circumstances imposed on the Admiralty by the deprivation of the services of the *Prestol* for twenty-two days.

I have gone at some length into this matter, but I think that, though I have done so, I have not in any way deviated from the view expressed by Bankes L.J. I find the nucleus of all I have said in the concluding words of his judgment, but as the authorities are authorities in this House I thought it right to put the matter in my own words.

I move that the appeal be dismissed with costs.

LORD SUMNER. My Lords, I agree that this appeal should be dismissed. As the *Prestol* would not in any case have been hired out during the time of repair, the Admiralty did not lose any hire, and consequently cannot claim it as damages caused by the *Susquehanna*. Again, no stand-by oiler was substituted for the *Prestol*, and therefore calculations based on the value of a non-existent stand-by are irrelevant. Nor is there any evidence that, in consequence of this collision, any other Admiralty oiler refused a charter, which otherwise would have been taken. The whole suggestion of chartering at this time is pure speculation. The fact is that the Admiralty by prompt effort and economy in consumption, acting in accordance with their obligation to minimize the damages, managed to get through their work without the *Prestol*, and they cannot get damages based on the use of a stand-by when in fact they did very well without one. There was no proof that any ship was without its due supply of oil, when required, or that any service of any ship was foregone or stinted for want of oil in consequence of this collision. If this had been so, it could and should have been proved, for the Admiralty knew the facts. In no case can this be matter of presumption. Unless such loss is proved, the reduction of the margin of supply or its total disappearance is not a head of pecuniary damages, for no actual harm was done. All the same the *Prestol's* services during the time of repair

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were lost, and accordingly the principle of *The Greta Holme* may be applied, with such rates of interest and depreciation as the evidence may justify. In other words, the loss of user for the time of repair, in effect, made the *Prestol's* then capital value infructuous for the time being, even though by special effort more benefit was got out of other ships, in which other capital was invested, than would otherwise have been the case. Apart from this I do not think there is any evidence of cost of maintenance or of any damage beyond the dock dues and the repair bill, nor do we know of any expenditure on officers and crew, which can be said to have been thrown away. As to these heads nothing can be presumed. If such loss can be proved, it will be dealt with by the learned registrar on ordinary principles. If, furthermore, any special expense was incurred in making the rearrangement necessitated by the *Prestol's* injuries, this may be taken into account also; but, if the rearrangement was brought about simply by greater effort on the part of the officers and crews or of shore officials, without extra expenditure, the Admiralty can make no claim, not having suffered any loss.

I would add that, if this matter were res integra, it is the Admiralty that suffered by this collision, not the *Prestol*, and accordingly the loss that is material is that suffered by them, taking their business as a whole, and not such as might be shown, if they owned nothing but the *Prestol* and an isolated account in respect of her were alone taken. Nothing, however, was made of this theoretic view in *The Greta Holme* (1) and the subsequent cases, and the practice of treating the injured ship, by a sort of personification, as a separate claimant is too inveterate to be disturbed now.

LORD PHILLIMORE. My Lords, I think that the judgment of the registrar was rightly overruled. I do not think that the case ought to be treated as one where the oil tank ship *Prestol* could have been treated as a ship to be let out on a mercantile charter, or that the Admiralty could claim on the footing that they required a similar vessel to take her

(1) [1897] A. C. 596.

place while she was under repair and so get a charter hire of a similar vessel. The facts are against this view. The Admiralty dared not have let her out because they would have lost their margin of provision, and they did not require to hire another vessel because they had this margin. But it is a case, I think, in which the Court which refers the matter back ought to give assistance and instruction to the registrar, and not leave the matter at large.

That the Admiralty may have some compensation for the detention of the *Prestol* must be taken as agreed. For if no such compensation were obtainable, the President ought not to have made any reference back. But there has been no cross appeal from his order.

Still, my Lords, when I listened to the argument of the leading counsel for the respondent, it seemed to me to be in logic an argument against any compensation. The only matters for which, according to his argument, any claims could be made, were the cost of letters and telegrams, which I suppose is nil (as they would have been transmitted on the King's service), and possibly the difference of expense between sending the *Belgol* to the Baltic from the Clyde instead of from Rosyth—damages which one might almost call contemptuous.

The case is not an unusual one. It must arise with every mail packet company which, in order to be sure of carrying out its engagements, must keep some margin of supply beyond its immediate requirements.

It may be a definite stand-by ship. It may be only such a luxury of provision that, without serious inconvenience, the service can be carried on by rearrangement. In such cases, the loss is the loss of the margin of safety. If there was a second accident, a ship would have to be hired to fill the gap.

If this were a case where there was a definite stand-by ship, the principle in the case cited by counsel for the respondent—*The M. J. Hedley* (referred to in Roscoe on Damages, 2nd ed., p. 98), where interest was allowed on the loss of a stand-by ship—would seem to be applicable.

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And this is, I think, the rationale of the allowance made in *The Mediana*. (1)

It may be said that the present case cannot be put so high because there is no definite stand-by ship. Still, during the period of detention, the Admiralty was without its margin of safety. If another vessel of the Fleet had been put out of action by any marine peril, they would have had to hire.

As it was, it is to be presumed that some one or more of the King's ships was or were not supplied with oil at the proper time, and so some loss of service was entailed or some risk run.

As was pointed out in the course of the argument, the judgment of Bankes L.J. seems to indicate this principle, but for myself I should like to make sure of this.

I find some difference in the expressions used by the other noble and learned Lords in their several opinions. But I desire to adopt the language of the noble and learned Lord, Lord Sumner: "The loss of user for the time of repair in effect made the *Prestol's* then capital value infructuous for the time being even though by special effort more benefit was got out of other ships in which other capital was invested than would otherwise have been the case."

This, as I understand it, means that the case of *The Greta Holme* (2) applies, and further that, as the noble and learned Lord, Lord Blanesburgh, says: "The true measure of damage is that adopted by the learned registrar in the case of *The Chekiang*."

LORD CARSON. My Lords, I concur.

LORD BLANESBURGH. My Lords, the *Prestol*, the Admiralty unit innocently involved in this collision, is an oil tanker and not a vessel of war. This fact has led the learned registrar to the interesting conclusion that he is justified in basing the sum to be allowed to the Admiralty in respect of the *Prestol's* detention for the necessary repair of her

(1) [1900] A. C. 113. (2) [1897] A. C. 596.

collision damage upon what may be described as her charterable value for the time so occupied. The question whether he was justified in taking that course is the main subject for consideration in this appeal.

So regarded, the case, I think, differs from the case of *The Chekiang* only in the fact that the *Prestol*, unlike the *Cairo*, is not a ship of war. A tanker of an ordinary commercial type, she is one of a fleet maintained by the Admiralty for the service of His Majesty's ships in their different stations throughout the world. Distinguished in two relevant respects from an ordinary ship of war in that the latter is both extra commercium and is never let on hire, a tanker, when the needs of the naval service so permit, may be and is occasionally let out by the Admiralty at ordinary commercial rates, and this circumstance—although it is not suggested that such a letting would be other than exceptional, or that any letting was actually in contemplation for the *Prestol* either at the time of collision or during the period of subsequent consequential detention—has led the learned registrar to raise the question already stated and to answer it as he has done. The President and the Court of Appeal have both disagreed with him.

My Lords, a consideration of the ratio decidendi in *The Greta Holme* (1)—the first case in which a sum for demurrage was included in the general collision damage awarded to a public authority in respect of a vessel engaged upon public duty—leads, I think, to the clear conclusion that the learned registrar, in acting as he did here, proceeded upon a wrong principle.

The claim, as the noble and learned Viscount on the Woolsack has already pointed out, is one for general and not for special damage; and while *The Kingsway* (2) is an instance of such a claim being allowed in the case of a vessel normally employed by her owners in plying for hire or profit, the case of *The Greta Holme* (1) itself shows that the Court does not proceed upon that basis where the money loss sustained by the temporary withdrawal of the damaged vessel cannot be quantified directly, and where the vessel is

(1) [1897] A. C. 596. (2) [1918] P. 344.

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not maintained and kept by her owners for the acquisition of gain.

The damaged vessel, in *The Greta Holme* case (1), was a dredger belonging to the Mersey Docks and Harbour Board not intended by the Board to be let, but a vessel for which a rent of 100*l.* a week could have been obtained by the Board without difficulty had they offered her for hire. The Board quantified their demurrage damage at 1500*l.*—the charterable value of the dredger for fifteen weeks during which she was, at the least, under repair for collision damage. This House, however, did not accede to that claim. Their Lordships assessed the demurrage damage at 500*l.* only, acting doubtless as a jury, but rejecting, it would seem, quite clearly the basis on which the Harbour Board formulated their claim—the basis which the learned registrar has here adopted.

This, of course, is not to say that such a basis may not properly be used where the claim is one for special damage. This is shown very neatly in the case of *The Valeria* (2), where a vessel, chartered by the Admiralty, was at the time employed by them as an ordinary trading vessel for freight. It was held by this House that the proper measure of damage for repair demurrage was the amount of freight which, but for the accident, the ship would have earned during the period of detention, plus working expenses.

But if regard is had to the principle upon which in such cases general damage under this head is recoverable at all, the exclusion of such a basis where the claim is for general damage only almost necessarily follows. The question, of course, only arises where, as here, the value of the service which would have been rendered by the damaged vessel during the period of repair cannot be quantified in money. Are public authority owners in such circumstances to receive no compensation at all for the compulsory withdrawal of their vessel from service? This House, in *The Greta Holme* (1), answered that question in the negative, and, as it was put by Lord Loreburn in *The Marpessa* (3), the daily sum which

(1) [1897] A. C. 596. (2) [1922] 2 A. C. 242.
(3) [1907] A. C. 241, 245.

it costs to maintain the service, may in such cases be regarded as the fair value of that service, and may well form the basis of compensation for its withdrawal. In some way or other it must be the value to the owners of the service lost or the cost to them of replacing it which is represented in the sum awarded. So much is required by the rules of the common law which must be followed in such matters. The sum cannot properly represent the value of something else altogether.

And while the cost of the service itself may be a good indication of its value, the hire which the vessel employed to render that service may be capable of earning in a totally different milieu can, one would suppose, be no such indication at all.

Accordingly, I reach the conclusion with the rest of your Lordships that the case must go back to the learned registrar for reconsideration.

My Lords, it would, I feel sure, be of great assistance to him if as definite a direction as to his proper course as is possible be now given. I should myself in this case be prepared to say that here the true measure of the main item of damage is that foreshadowed in *The Greta Holme* (1) and adopted, as developed in subsequent cases, by the learned registrar in the case of *The Chekiang*. That measure has been approved in many cases; it has been frequently adopted in chambers, as is made apparent in the case of *The Chekiang;* and its adoption by the learned registrar in that case is not disapproved of by your Lordships. It seems in no way inappropriate in the present case: it has the merit of simplicity, and it appears to me, my Lords, that in a class of case where, however elaborate the inquiry, the result must always be, as applied to the real situation, more or less arbitrary, the application of a measure which has had the sanction of your Lordships' House, which is convenient of application and is not extravagant in result, may well be encouraged in any proper case.

If I am not mistaken, my noble and learned friend

(1) [1897] A. C. 596.

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Lord Sumner is not averse to the application of this principle as applied to quasi-mercantile vessels like the *Prestol*; but if I am in this under any misapprehension I am well content that the learned registrar should take his direction from my noble friend's opinion.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

Lords' Journals, June 18, 1926.

Solicitor for the appellants: *Treasury Solicitor.*
Solicitors for the respondents: *Thomas Cooper & Co.*

[HOUSE OF LORDS.]

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R. E. JONES, LIMITED . . . . . APPELLANTS;

AND

WARING AND GILLOW, LIMITED . . RESPONDENTS.

Money paid under a Mistake of Fact — Recovery — Fraud — Estoppel — Cheque — "Holder in due course" — Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 2, 21, *sub-s.* 2; 29, *sub-s.* 1; 31.

The original payee of a cheque is not a "holder in due course" within the meaning of the Bills of Exchange Act, 1882.

Dictum of Lord Russell of Killowen in *Lewis* v. *Clay* (1897) 67 L. J. (Q. B.) 224 approved.

Dictum of Fletcher Moulton L.J. in *Lloyds Bank* v. *Cooke* [1907] 1 K. B. 794 disapproved.

B., being indebted to the defendants under a hire-purchase agreement in a sum of 5000*l.*, which he had no means of paying, represented to the plaintiffs that he was the agent of a firm of motor manufacturers, who were putting on the market a new car, and persuaded the plaintiffs to sign a form of agreement appointing them on behalf of the firm agents for the sale of the car on the terms that the plaintiffs should purchase 500 cars and pay 5000*l.* as a deposit. On the plaintiffs objecting to pay this sum to B. or to the firm, B. told them that the defendants were financing the firm and were his principals, and suggested that the 5000*l.* might be paid to them. The plaintiffs then drew two cheques to the order of the defendants, one for 2000*l.* and one post-dated for 3000*l.*, and handed them to B., who handed

* *Present:* VISCOUNT CAVE L.C., LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD SUMNER, and LORD CARSON.

them on to the defendants in payment of his debt. The defendants objected to the cheques as being irregular in form, and as the result of a conversation through the telephone between the defendants and the plaintiffs, no mention being made of the purpose of the payment, the plaintiffs took back the irregular cheques and posted to the defendants a new cheque for 5000*l.* duly signed. The defendants cashed the cheque and returned to B. goods which they had seized under the hire-purchase agreement. No such motor firm or car as alleged existed. On discovery of the fraud the plaintiffs sued the defendants for the recovery of the 5000*l.* as money paid under a mistake of fact:—

Held (by Lord Shaw of Dunfermline, Lord Sumner, and Lord Carson; Viscount Cave L.C. and Lord Atkinson dissenting), that the plaintiffs were entitled to recover on the principle of *Kelly* v. *Solari* (1841) 9 M. & W. 54.

Held by Viscount Cave L.C. (with the concurrence of Lord Atkinson), that, the plaintiffs having by their conduct induced the defendants to believe that the plaintiffs were indebted to them in the amount of the cheque, and the defendants having acted to their detriment on the faith of that belief, the plaintiffs were estopped from recovering the money.

Watson v. *Russell* (1862) 3 B. & S. 34; (1864) 5 B. & S. 968 explained and distinguished.

Order of the Court of Appeal [1925] 2 K. B. 612 reversed and judgment of Lord Darling (sitting as an additional judge of the King's Bench Division) restored.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Lord Darling, sitting as an additional judge of the King's Bench Division, at the trial of the action.

The appellants (plaintiffs) claimed by their action to recover a sum of 5000*l.* paid to the respondents (defendants) by cheque as money paid under a mistake of fact.

The facts are fully stated in the report of the case before the Court of Appeal, and sufficiently appear from the judgment of the Lord Chancellor, and they are summarized in the headnote.

Lord Darling gave judgment in favour of the appellants, but his judgment was reversed by the Court of Appeal (Pollock M.R., Scrutton and Sargant L.JJ.).

1926. Feb. 11, 15, 16, 18, 19. *Grant K.C.* and *Eustace Hills K.C.* (with them *Morle*) for the appellants. The appellants have made this payment in fulfilment of a supposed

(1) [1925] 2 K. B. 612.

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obligation, which did not in fact exist, and if they had known that fact they would not have made the payment. They are therefore entitled to recover the money as having been paid under a mistake of fact: *Kelly* v. *Solari* (1); *Kerrison* v. *Glyn Mills, Currie & Co.* (2) This principle is accepted by Warrington L.J. in *Steam Saw Mills Co.* v. *Baring.* (3) The mistake here was as to the parties to the contract. The appellants, relying on the statement of Bodenham that International Motors were really the respondents, believed that a contract existed between them and the respondents in respect of which they were bound to pay 5000*l.* to the respondents. *Watson* v. *Russell* (4), which was relied upon in the Court of Appeal, shows that if a principal puts it into the power of an agent to do a certain act and instructs him to do it sub conditione and the agent suppresses the condition, the principal is liable: see Byles on Bills, 9th ed., p. 159. But here Bodenham was not the agent of the appellants. He was a mere intermediary, for whom the appellants were in no way responsible. That case is distinguishable, first, because it proceeded entirely on agency, and, secondly, because there was there no mistake of fact. The dictum of Crompton J. in that case, to the effect that if A. by means of a false pretence procures B. to give a cheque to C., who receives it bona fide for value, C. can deal with the cheque as he pleases, without regard to the fraud committed by A. on B., was not necessary to the decision and is not law, except as applied to a case where A. is B.'s agent. It is no answer to a claim to recover money paid under a mistake of fact that the defendant (apart from any question of agency) has altered his position to his detriment, e.g., by parting with the money: *Newall* v. *Tomlinson* (5); *Continental Caoutchouc Co.* v. *Kleinwort* (6); *Baylis* v. *Bishop of London* (7); *Durrant* v. *Ecclesiastical Commissioners.* (8) [They also referred to and

(1) 9 M. & W. 54.
(2) (1909) 101 L. T. 675; 15 Com. Cas. 1; (1911) (H. L.) 105 L. T. 721; 17 Com. Cas. 41.
(3) [1922] 1 Ch. 244, 253.
(4) 3 B. & S. 34; 5 B. & S. 968.
(5) (1871) L. R. 6 C. P. 405.
(6) (1904) 9 Com. Cas. 240, 248.
(7) [1913] 1 Ch. 127, 137.
(8) (1880) 6 Q. B. D. 234.

distinguished *Aiken* v. *Short* (1); *Foster* v. *Green* (2); *Atlee* v. *Backhouse* (3); *Symonds* v. *Atkinson* (4); *Skyring* v. *Greenwood* (5); *Holt* v. *Markham*. (6)]

Jowitt K.C. and *Woodgate* for the respondents. The appellants never believed that the respondents were the alter ego of International Motors. It was represented to them that the respondents were financing the flotation of a company about to be formed, or were financing the firm, but the respondents did not believe that the actual contracting parties vis-à-vis them were the respondents. If the respondents were financing the concern, in no proper sense could they be the principals. The appellants were really using the respondents as stake-holders of the money. This case is exactly covered by the dictum of Crompton J. in *Watson* v. *Russell*. (7) That dictum is not limited to the facts of that particular case, but applies to a case where the intermediary has committed a fraud. Further, the respondents were holders of the cheque in due course within the meaning of the Bills of Exchange Act, 1882. By s. 2 " holder " is defined as meaning " the payee or indorsee." By s. 30, sub-s. 2, " every holder of a bill is prima facie deemed to be a holder in due course." By s. 29, sub-s. 1, to be a holder in due course it is essential that the holder should have taken the bill in good faith and for value, and that at the time the bill was " negotiated " to him he had no notice of any defect in the title of the person who negotiated it. By s. 21, sub-s. 2, where the bill is in the hands of a holder in due course, a valid delivery is conclusively proved. Assuming that the word " negotiated " in s. 29, sub-s. 1, is sufficiently met by transference by the drawer to the payee, the respondents were holders in due course. This was Fletcher Moulton L.J.'s view in *Lloyds Bank* v. *Cooke* (8), where he advances powerful reasons for holding that a holder in due course includes a payee, and his view was indorsed by Farwell L.J.

(1) (1856) 1 H. & N. 210, 215.
(2) (1862) 7 H. & N. 881.
(3) (1838) 3 M. & W. 633.
(4) (1856) 1 H. & N. 146.
(5) (1825) 4 B. & C. 281.
(6) [1923] 1 K. B. 504.
(7) 3 B. & S. 34, 38.
(8) [1907] 1 K. B. 794, 805–8.

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in *Talbot* v. *Von Boris*. (1) And see Chalmers on Bills of Exchange. There is, however, a dictum to the contrary by Lord Russell of Killowen in *Lewis* v. *Clay*. (2) It is submitted that the Act did not intend to alter the common law without express language, and that Fletcher Moulton L.J.'s view should be preferred. Assume that the respondents are not holders in due course, where the payee has given valuable consideration and is bona fide, it is no defence to an action on the cheque that it was obtained by the fraud of a third party, and if the respondents, whether holders in due course or not, can maintain an action on the cheque, it follows that they cannot be compelled to pay back the money: *Sutters* v. *Briggs*. (3) As to recovery of money paid under a mistake of fact (apart from the special code) the authorities are conflicting. The foundation of the action is dependent upon an implied promise to pay. It is based upon "ex aequo et bono." But it is now laid down that it does not matter how negligent is the person paying or how irreparable the damage may be to the person receiving the money, so that it has become difficult to formulate the proposition upon which the doctrine can be limited. See notes to *Marriot* v. *Hampton* in Smith's Leading Cases (4), where the authorities are collected. It is ridiculous to say it is "ex aequo et bono" that the person receiving the money should be called upon to make good the negligence of the person who paid it. The only mistake here was that the appellants supposed that Bodenham was an honest man, and believed that they had got either from Bodenham or from the International Motors a valuable agreement, which was in fact worth nothing. That was not a void but a voidable agreement. In any case this was a mistake of fact with which the respondents had nothing to do, and that is an answer to the appellants' claim: *Skyring* v. *Greenwood* (5); *Chambers* v. *Miller* (6); *Pollard* v. *Bank of England* (7);

(1) [1911] 1 K. B. 854, 865.
(2) 14 Times L. R. 149; 67 L. J. (Q. B.) 224.
(3) [1922] 1 A. C. 1, 24.
(4) 2 Sm. L. C. (12th ed.) 403.
(5) 4 B. & C. 281.
(6) (1862) 13 C. B. (N. S.) 125; 32 L. J. (C. P.) 30.
(7) (1871) L. R. 6 Q. B. 623.

Deutsche Bank (*London Agency*) v. *Beriro*. (1) The authorities may be thus analysed: For repayment of money paid under a mistake of fact either (1.) the mistake must be common to both parties, or (2.) the defendant must have contributed to the mistake or been aware of it, or (3.) the defendant's position must not have been altered to his detriment in consequence of the repayment. In *Baylis* v. *Bishop of London* (2) the bishop had contributed to the mistake. In *Kerrison* v. *Glyn Mills, Currie & Co.* (3) and in *Kleinwort* v. *Dunlop Rubber Co.* (4) the position of the defendants had not been prejudiced. "It may also be laid down as a general rule usually applicable to this action that the person who received the money must not, through the neglect or misconduct of the person who has paid it, be placed in a worse position than if it had not been paid." The respondents rely on that statement, which is taken from the notes to *Marriot* v. *Hampton* in Smith's Leading Cases, 12th ed., vol. ii., p. 430, and on the authorities cited in support of it.

[They referred to *Cocks* v. *Masterman*. (5)]

Then, what is the position where the person receiving the money is under some contract with a third party? It is suggested that the money cannot be recovered. In *Calland* v. *Loyd* (6) Lord Abinger asks (arguendo): "Suppose a man had money in his hands to pay to a particular person, and he paid his own debt with it; could the owner bring money had and received?"

Lastly, the appellants, who were guilty of almost incredible folly, are precluded from recovering the money by handing the cheques to Bodenham and so putting it into his power to cause the difficulty. To quote the words of Holt C.J., which are cited with approval by Lord Halsbury in *Lloyd* v. *Grace, Smith & Co.* (7), "seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser

(1) (1895) 73 L. T. 669.
(2) [1913] 1 Ch. 127.
(3) 105 L. T. 721; 17 Com. Cas. 41.
(4) (1907) 97 L. T. 263.
(5) (1829) 9 B. & C. 902.
(6) (1840) 6 M. & W. 26, 27.
(7) [1912] A. C. 716, 727.

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than a stranger." So in *Lickbarrow* v. *Mason* (1) Ashhurst J. lays it down as a broad general principle that "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."

[At the conclusion of the argument on behalf of the respondents, the respondents through their counsel undertook, in any event, not to retain anything to which they were not morally entitled, the question of the amount to be referred to arbitration in default of agreement.]

Grant K.C. in reply. *Kelly* v. *Solari* (2) shows that if a man pays money to another under a mistake of fact he can recover, whatever the state of mind of the person receiving the money; there is no need for a double mistake. It also shows that mere negligence on the part of the person paying the money affords no defence to the action, and here no case of negligence was made at the trial. In *Imperial Bank of Canada* v. *Bank of Hamilton* (3) Lord Lindley, delivering the judgment of the Judicial Committee, consisting of himself, Lord Macnaghten, Lord Robertson, and Sir Arthur Wilson, approves *Kelly* v. *Solari* (2), and explains *Cocks* v. *Masterman.* (4) On the question whether the appellants are responsible for Bodenham, *Lloyd* v. *Grace, Smith & Co.* (5) was decided on the principle of agency, but Bodenham was not the appellants' agent, he was a mere carrier. As to the point under the Bills of Exchange Act, the dictum of Lord Russell of Killowen in *Lewis* v. *Clay* (6) is to be preferred to the dictum of Fletcher Moulton L.J. in *Lloyds Bank* v. *Cooke.* (7) A bill of exchange has two phases: first, issue, and, secondly, negotiation. "Issue" is defined as meaning "the first delivery of a bill . . . . , complete in form, to a person who takes it as a holder." When the bill is issued and gets into the hands of the payee it can then be negotiated, and a holder in due course is a person to whom the bill has been negotiated. The

(1) (1787) 2 T. R. 63, 70; 1 Sm. L. C. (12th ed.) 726, 734.
(2) 9 M. & W. 54.
(3) [1903] A. C. 49.
(4) 9 B. & C. 902.
(5) [1912] A. C. 716.
(6) 14 Times L. R. 149.
(7) [1907] 1 K. B. 794.

Act begins with the issue of the bill and does not deal with negotiation until s. 31. Fletcher Moulton L.J. has confused these two stages. Then it is said that in any event the respondents were bona fide holders for value, but the documents given up were irregular and void as they stood to the knowledge of the respondents, and therefore no valuable consideration was given for the cheque for 5000*l.*

The House took time for consideration.

1926. June 18. VISCOUNT CAVE L.C. My Lords, this action arose out of circumstances which are fortunately unusual. A man named Bodenham obtained from the respondents, Messrs. Waring & Gillow, Ld., furniture and other goods of the value of about 13,800*l.* upon the terms of a hire-purchase agreement dated November 29, 1919, by which he agreed to pay 5000*l.* down and afterwards a monthly sum until the whole purchase money was paid. He gave his cheque for the 5000*l.*, but it was dishonoured; and the respondents sued him upon the cheque and retook possession of the furniture. Bodenham, being without means, called at the London office of the appellants, Messrs. R. E. Jones, Ld., and told them that he represented a firm of motor manufacturers bearing the name of International Motors who had the control of a car called the "Roma" car; he produced an illustrated prospectus and specification of the car, and offered on behalf of International Motors to appoint the appellants agents for the sale of the car in South Wales and the south-west of England. There was at that time a large demand for cars, and after a short negotiation the appellants accepted the proposal. Bodenham then put before the appellants a form of agency agreement to be signed by International Motors and the appellants, one term of the agreement being that the appellants should purchase not less than 500 "Roma" cars and should upon the execution of the agreement deposit with International Motors the sum of 5000*l.*, being 10*l.* per car upon the 500 cars. The appellants demurred to paying this large sum to Bodenham or to International Motors (whom they did not know), and

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Bodenham then told them (to quote the statement of counsel for the plaintiffs at the trial, which was accepted by the defendants as correct) "that the people who were financing the thing and who were the principals behind him in the matter were Messrs. Waring & Gillow, the well known Oxford Street firm," and that if the agency agreement were signed the deposit of 5000*l.* might be paid to them. This statement satisfied the appellants, who knew Messrs. Waring & Gillow as a firm of high standing; and they signed the agreement (which was dated December 31, 1919) and handed to Bodenham two cheques payable to the order of the respondents, one being a cheque for 2000*l.* dated December 31, 1919, and the other a cheque for 3000*l.* post-dated January 14, 1920. Bodenham then called on the respondents, to whom he had previously stated that he expected large payments under some valuable contracts, and handed the two cheques to them as a payment of his deposit of 5000*l.* under the hire-purchase agreement. The respondents' chief accountant noticed that the cheques were signed by one director only of the appellant company, although the form of cheque was adapted for signature by two directors and the secretary, and also that one of the cheques was post-dated; and in a telephone conversation between the representatives of the appellants and the respondents, in which nothing was said about the purpose of the payment, it was arranged that the two imperfect cheques should be returned to the appellants and a fresh cheque for 5000*l.* duly signed and posted to the respondents. This was accordingly done, and the respondents cashed the cheque for 5000*l.* and on the faith of this payment restored to Bodenham the furniture which they had seized and let him have some more. On January 15, the appellants not having heard from Bodenham about the cars, their secretary called upon the respondents, and thereupon the whole fraud was exposed. There was no firm called International Motors and no "Roma" car; and the statements made by Bodenham to the appellants as to the car and as to the connection of the respondents with it were a tissue of lies, concocted by Bodenham with a view to getting 5000*l.* paid to the respondents

and representing it to be the deposit under his hire-purchase agreement. The respondents then again took possession of the furniture, and Bodenham has since been sentenced to a term of imprisonment for another fraud.

On March 26, 1920, the appellants commenced this action against the respondents, claiming repayment of the 5000*l.* as money had and received by the defendants for the use of the plaintiffs, or alternatively as money paid for a consideration which had failed or as money paid under a mistake of fact. They also claimed damages for negligence, but this claim has not been pressed. The action was tried by Lord Darling, sitting as an additional judge of the King's Bench Division, who gave judgment for the plaintiffs; but on appeal to the Court of Appeal the judgment was set aside and judgment given for the defendants. The plaintiffs have now appealed to this House.

To the above statement of facts it is only necessary to add that no moral blame of any kind is to be imputed either to the appellants or to the respondents. They are both innocent parties; and the only question to be determined is one of law—namely, which of these two innocent parties is to suffer for Bodenham's fraud?

My Lords, the ground upon which the plaintiffs (the appellants) have rested their case before your Lordships is, that they are entitled to recover the 5000*l.* as money paid under a mistake of fact; and I apprehend that, but for the special defences raised by the defendants, to which I will refer later, there could be no doubt as to their right to succeed on this ground. The plaintiffs were told by Bodenham that he represented a firm called International Motors which was about to be formed into a company, that the firm had control of a car called the "Roma" car which he described as an existing car, and that the defendants were financing the firm and were the principals behind him and behind International Motors in the matter. Believing these statements to be true, the plaintiffs entered into an agreement which bound them to pay a deposit of 5000*l.* on 500 Roma cars; and still believing them to be true, and that the respondents as the nominees

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of International Motors could give a good receipt for the 5000*l.*, they paid that sum to the respondents. In fact the statements were untrue from beginning to end; and the money was, therefore, paid under a mistake of fact induced by the false statements of a third party and, apart from special circumstances, could be recovered. As to the general principle, it is sufficient to refer to the well known case of *Kelly* v. *Solari* (1), and to the more recent decisions in *Colonial Bank* v. *Exchange Bank of Yarmouth, Nova Scotia* (2) and *Kerrison* v. *Glyn Mills, Currie & Co.* (3)

My Lords, it was contended on behalf of the respondents that they were "holders in due course" of the cheque for 5000*l.* within the meaning of s. 21, sub-s. 2, of the Bills of Exchange Act, 1882, and entitled on that ground to retain the proceeds of the cheque. I do not think that the expression "holder in due course" includes the original payee of a cheque. It is true that under the definition clause in the Act (s. 2) the word "holder" includes the payee of a bill unless the context otherwise requires; but it appears from s. 29, sub-s. 1, that a "holder in due course" is a person to whom a bill has been "negotiated," and from s. 31 that a bill is negotiated by being transferred from one person to another and (if payable to order) by indorsement and delivery. In view of these definitions it is difficult to see how the original payee of a cheque can be a "holder in due course" within the meaning of the Act. Sect. 21, sub-s. 2, which distinguishes immediate from remote parties and includes a holder in due course among the latter, points to the same conclusion. The decision of Lord Russell in *Lewis* v. *Clay* (4) was to the effect that the expression does not include a payee; and the opinion to the contrary expressed by Fletcher Moulton L.J. in *Lloyds Bank* v. *Cooke* (5) does not appear to have been accepted by the other members of the Court of Appeal. This contention therefore fails.

The second answer of the respondents is founded on the

(1) 9 M. & W. 54.
(2) (1885) 11 App. Cas. 84.
(3) 17 Com. Cas. 41.
(4) 67 L. J. (Q. B.) 224; 14 Times L. R. 149.
(5) [1907] 1 K. B. 794.

case of *Watson* v. *Russell*. (1) In that case a ship had been chartered by the defendants to one Keys and had been sub-chartered by Keys through the agency of the plaintiff to a third party. The hire money being in arrear and the defendants being in a position to put an end to the charter, the plaintiff handed to Keys a cheque payable to the order of the defendants for one half of the amount due, and instructed him to deliver it to the defendants with an intimation that it was given in consideration that the ship should perform the charter. Keys sent the cheque to the defendants as a payment on account of the hire money for the ship, but omitted to inform them of the condition upon which it had been handed to him; and the defendants kept the cheque and put an end to the charter. It was held that the plaintiff could not recover the amount of the cheque; and Crompton J., in delivering the judgment of a majority of the Court of Queen's Bench (Crompton, Blackburn and Mellor JJ.), said: "If A., by means of a false pretence or a promise or condition which he does not fulfil, procures B. to give him a note or cheque or acceptance in favour of C., to whom he pays it, and who receives it bona fide for value, B. remains liable on his acceptance. His acceptance imports value and liability prima facie, and he can only relieve himself from his promise to pay C. by showing that C. is not holder for value, or that he received the instrument with notice or not bona fide. The instrument is one which C. has a right to take, relying on the acceptance or making of the party, and it is no answer to say that there is no consideration as between him and the acceptor or maker, if the holder took it bona fide for value." This decision was affirmed in the Exchequer Chamber by a strong Court, and it is no doubt a decision of great authority; but on full consideration I am not satisfied that it covers the present case. No doubt Bodenham (like Keys in the case cited) was commissioned by the drawers of the cheques for 2000*l*. and 3000*l*. to carry them to the payees, his mandate being coupled with the condition—plainly to be inferred from the admitted facts—that he should hand them to the

(1) 3 B. & S. 34, 38; 5 B. & S. 968.

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payees as a deposit on the cars; and this condition he failed to perform. So far the cases are very similar. But, on the other hand, there was not in *Watson's* case (1), as there was in this case, a mistake of fact on the part of the drawers of the cheques; and I am impressed by the circumstance —to which some of your Lordships have called attention— that *Watson's* case (1) has been treated in the books as applying only where an agency exists, and that in the present case there was no agency in any real sense of the word. It is to be observed also that the effective cheque, the cheque for 5000*l.*, did not pass through Bodenham's hands at all. Upon the whole, therefore, I think that this defence also fails.

But the respondents made a further point, founded on the law of estoppel, which appears to me to deserve very careful consideration. The appellants, it is said, without previous communication with the respondents, drew cheques in their favour for sums amounting to 5000*l.*, a proceeding which (as Crompton J. said in *Watson* v. *Russell* (2)) "imported liability" and would naturally lead the respondents to believe that the appellants were indebted to them in that amount. The appellants then unwisely, if not recklessly, put those cheques into the hands of Bodenham (whom they hardly knew and whom they had no reason to trust) for delivery to the respondents, thereby enabling him to make such representations as he might think fit as to the purpose of the payment. Later, when the respondents communicated with the appellants with regard to the original cheques and obtained from them a substituted cheque for 5000*l.*, the appellants still said nothing about the purpose for which the payment was made, but left it to the respondents to rely on such statements as might have been made to them by Bodenham. The natural result of this conduct on the part of the appellants was that the respondents believed that the appellants were indebted to them in the sum of 5000*l.* and were paying it to them for the purpose which Bodenham falsely described; and it was in that belief, so induced, that they accepted the payment and re-delivered to Bodenham

(1) 3 B. & S. 34; 5 B. & S. 968. (2) 3 B. & S. 34, 38.

the goods which they had seized and let him have additional goods. No doubt they afterwards resumed possession of the goods; but there can be no doubt that the goods so resumed had suffered depreciation since the time when they were re-delivered or delivered to Bodenham, and the respondents have accordingly suffered some detriment. In these circumstances, it is argued, the doctrine of estoppel applies, and the appellants are prevented by their own conduct, on which the respondents acted to their disadvantage, from disputing the payment of 5000*l.* and claiming repayment of that amount.

My Lords, there is a great body of authority in favour of the view that, where a person to whom money has been paid by mistake has been misled by the payer's conduct, and on the faith of that conduct has acted to his own detriment, the payer cannot in law—as surely he cannot in fairness—insist on repayment. The well known dictum of Ashhurst J. in *Lickbarrow* v. *Mason* (1), that "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it," cannot now be treated as free from exception; but it still holds good as a general principle, and where the payer has been guilty of anything which can be called negligence or indiscretion, there has been no hesitation in applying it: see per Lord Halsbury in *Farquharson & Co.* v. *King & Co.* (2) Thus, in *Kleinwort* v. *Dunlop Rubber Co.* (3) the plaintiff claiming repayment of money paid by mistake succeeded only because the jury had answered in the negative the question whether the defendants had been led by the plaintiff's mistake to alter their position to their own disadvantage; and Lord Loreburn, in expressing his opinion in this House, said that "it is indisputable that, if money is paid under a mistake of fact and is re-demanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid in whatever character it was received." The same condition

(1) 2 T. R. 63, 70. (2) [1902] A. C. 325, 332.
(3) 97 L. T. 263, 264.

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of the payer's right to recover—namely, the absence of any alteration of the payee's position to his detriment—has been emphasized in other cases such as *Continental Caoutchouc Co.* v. *Kleinwort* (1) and *Kerrison* v. *Glyn Mills, Currie & Co.* (2); and in *Deutsche Bank* v. *Beriro* (3) and *Holt* v. *Markham* (4) the plaintiffs failed on that ground. It is true that, where the payee has done nothing more than to expend the money on his own purposes, that has been held to afford no defence: *Standish* v. *Ross* (5); *Baylis* v. *Bishop of London* (6), but this may be because the payee has suffered no real detriment. *Durrant* v. *Ecclesiastical Commissioners* (7) is not easy to reconcile with the later decisions.

My Lords, the general rule as laid down in the authorities above cited appears to me to be sufficient to determine this case; and, this being so, it is unnecessary to dwell on the circumstance that the principle of estoppel has been applied with special stringency to claims to recover money paid on bills of exchange and other negotiable instruments. Instances of such an application are to be found in the well known case of *Cocks* v. *Masterman* (8), in Mathew J.'s judgment in *London and River Plate Bank* v. *Bank of Liverpool* (9), and in the observations of Buckley L.J. in *Morison* v. *London County and Westminster Bank.* (10) But the bearing on those authorities of the decision of this House in *Imperial Bank of Canada* v. *Bank of Hamilton* (11) was not fully dealt with in the argument of this case; and accordingly, while I am inclined to the view that the rule in *Cocks* v. *Masterman* (8) lends support to the conclusion at which I have arrived, I have thought it best to rest my opinion on the wider ground taken in the *Dunlop Co.'s* case. (12)

Upon the whole I have come to the conclusion that on the ground of estoppel the respondents are entitled to succeed.

In the course of the argument it was pointed out that

(1) 9 Com. Cas. 240.
(2) 17 Com. Cas. 41, 54.
(3) 73 L. T. 669.
(4) [1923] 1 K. B. 504.
(5) (1849) 3 Ex. 527.
(6) [1913] 1 Ch. 127.
(7) 6 Q. B. D. 234.
(8) 9 B. & C. 902.
(9) [1896] 1 K. B. 7.
(10) [1914] 3 K. B. 356, 378.
(11) [1903] A. C. 49.
(12) 97 L. T. 263.

if the respondents succeeded in retaining the 5000*l.*, and if the loss which they had suffered by reason of the re-delivery of the goods and the delivery of further goods to Bodenham on the faith of that payment amounted to less than that sum, they would be in the position of making a profit in consequence of Bodenham's fraud. The respondents very naturally and properly disclaimed any desire to make such a profit, and undertook to return to the appellants such part (if any) of the 5000*l.* as was in excess of the damage or detriment which they (the respondents) had sustained by reason of such re-delivery and further delivery of goods and the use thereof by Bodenham until possession was again taken by the respondents, any difference as to the amount of such damage or detriment to be referred to arbitration. I think that this undertaking should be recited in the order to be made on this appeal; but subject to that undertaking I would dismiss this appeal.

Lord Atkinson. My Lords, I concur.

Lord Shaw of Dunfermline. My Lords, I am of opinion that this appeal should succeed, and that the respondents, Messrs. Waring & Gillow, should repay to the appellants the sum of 5000*l.* paid by the latter to the former under mistake in fact.

With the narrative of the circumstances of the case given by my noble and learned friend upon the Woolsack I respectfully and substantially agree. That narrative is well within the evidence. I further respectfully agree with the Lord Chancellor that the money was paid under a mistake in fact, or, rather, I should put it, under a series of mistakes in fact. These mistakes were induced by the false statements of Bodenham, which, to use language already employed, were a tissue of lies.

What Bodenham represented was (1.) that there was a firm called "International Motors"; (2.) that they were putting upon the market an existing car called the "Roma" car, of which he exhibited a sketch and specifications; (3.) that by an agreement which Bodenham induced them to sign they became the purchasers of 500 of these cars, in

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respect of each of which a deposit of 10*l.* was to be made, making in all 5000*l.*; and (4.) that Messrs. Waring & Gillow were the financial backers of the International Motors, and that accordingly it was appropriate and suitable that, as such, a cheque for the sum should be made payable to them. The plausibility of Bodenham, who is now a convict and was then an accomplished rogue, succeeded on these representations in inducing this payment to be made.

The truth was that there was no firm of International Motors, that there was no Roma car, that the purchase was accordingly of a phantom article from a phantom seller, that the respondents were not financial backers of the International Motors, and that, finally, no sum was due in respect of this illusive transaction from Messrs. Jones to Messrs. Waring & Gillow or anybody else.

Bodenham was apparently a person of expensive habits and had ordered large quantities of furniture from the respondents. The bargain was a hire-purchase bargain, requiring an initial payment of 5000*l.* He endeavoured to meet this obligation by his cheque, in favour of the respondents, but that cheque was, on presentation by them to the bank, dishonoured. Bodenham then immediately thereafter produced the appellants' cheques for 2000*l.* and 3000*l.*, for which, being signed inadvertently by only one director, a fresh cheque for 5000*l.* was duly and properly signed and posted to the respondents. The respondents accepted this cheque. As to how it had originated, or how Bodenham, whose own cheque had been dishonoured, was thus suddenly put into possession of funds, the respondents made no inquiry either of Bodenham or Messrs. Jones whose cheque it was.

The appellants had no knowledge of any indebtedness by Bodenham to the respondents, and their cheque passed to the respondents solely and wholly because they were misled into the series of mistakes in fact already noted. It seems quite clear that they would never have parted with their money to the respondents if they had had any knowledge whatsoever of the real truth. There is in my view no question of mandate or agency in the case.

It remains to be considered whether in these circumstances the money so paid under mistake in fact should not be repaid.

On the second part of the case I further agree entirely with the judgment from the Woolsack. What the respondents did with the cheque was to place it to their bank credit. It was never a negotiated cheque in the ordinary sense of that word or in the sense of s. 31 of the Bills of Exchange Act. The cheque never went into the circle by transfer or indorsation, and it is in these circumstances, in my opinion, inappropriate to use language as to "a holder in due course" as applicable to the position of a direct payee of a cheque. The matter is treated so, and I think rightly, by Lord Russell C.J. in *Lewis* v. *Clay* (1), and I, too, venture to disagree with the view to a contrary effect expressed by Fletcher Moulton L.J. in *Lloyds Bank* v. *Cooke*. (2) It is in substance just the same as if the appellants instead of posting their cheque had sent along, per messenger, bank notes for 5000*l*.

In these circumstances I am of opinion that the demand of the appellants for the refund of the contents of the cheque is sound, and should be granted.

The case of *Watson* v. *Russell* (3) is much relied upon in the Court of Appeal. But I suppose it may at least safely be said that *Watson* v. *Russell* (3) has never been treated as though it imported an invasion or evasion of the long established rule as to the effect of mistake in fact and as to the title to refund in consequence thereof.

I propose to explain in a few words that I think *Watson* v. *Russell* (3) applies to a different set of circumstances from the present. And it belongs to a different class of case. It has not, in my opinion, any real bearing upon cases depending upon payments having been made under a mistake in fact. The class of case ruled by *Watson* v. *Russell* (3) is confined solely to that of payments made under a condition not communicated to the receiver, a condition as to the future conduct which it was hoped, expected or stipulated should follow the payment.

(1) 67 L. J. (Q. B.) 224; 14 Times L. R. 149.

(2) [1907] 1 K. B. 794.

(3) 3 B & S. 34; 5 B. & S. 968.

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Before determining the point of difference between these two classes of cases it is important to note exactly the principle of cases of refund on account of mistake in fact, as that principle was authoritatively expounded by Parke B. in *Solari's* case. (1) Said that very learned judge: "I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cases cited, to have been founded on the dictum of Mr. Justice Bayley in the case of *Milnes* v. *Duncan* (2); and with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it."

My Lords, the facts of the present case appear to me exactly to meet all the requirements of the principle thus set forth.

It is quite true that various attempts have been made, not to attack the elementary rule set forth in the first portion of the citation, but to set up a species of estoppel by reason of the carelessness of the person who was misled into the

(1) 9 M. & W. 54, 58. (2) (1827) 6 B. & C. 671.

mistake in fact. I am not aware that in the whole course of the decisions such an assault upon *Solari's* case (1) has ever been successful, and since its date in 1841 it has, I believe, remained of paramount authority as part of the law of England. In the language, for instance, of Lord Lindley in *Imperial Bank of Canada* v. *Bank of Hamilton* (2): "As regards negligence in paying the cheque: It cannot be denied that when the Bank of Hamilton paid the cheque on January 27 it had means of ascertaining from its own books that the cheque had been altered. But means of knowledge and actual knowledge are not the same; and it was long ago decided in *Kelly* v. *Solari* (1) that money honestly paid by a mistake in facts could be recovered back, although the person paying it did not avail himself of means of knowledge which he possessed. This decision has always been acted upon since."

More recent cases have affirmed the general principle, and I refer in particular to the judgment of Lord Sumner, then Hamilton J., in *Kerrison* v. *Glyn Mills, Currie & Co.* (3)

This being the general principle of the law as to payments made under mistake in fact, I now inquire what was the general principle of *Watson* v. *Russell.* (4) The first observation to make is that there was no mistake in fact whatsoever in that case. What had happened was that the defendant had chartered a ship to one Keys at a certain rate per week, to be paid for four weeks in advance. Keys sub-chartered the ship to Messrs. Barnes. Keys had paid the first instalment, but he was unable to pay the second, except with Messrs. Barnes' assistance, and, as Crompton J. states: "Not being able to remit the money due to the defendant, he applied to the plaintiff for some assistance, who then gave him the cheque in question, dated December 22, 1860, drawn on Messrs. J. Barnes & Co. for 60*l.* payable to the order of the defendant, but on the terms that he was to inform the defendant, by the letter enclosing the

(1) 9 M. & W. 54.
(2) [1903] A. C. 49, 56.
(3) 15 Com. Cas. 1.
(4) 3 B. & S. 34, 36; 5 B. & S. 968.

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cheque, that it was given 'in consideration that the *Martje Flors* should perform the charter and go to Gibraltar and back.'"

The cheque was forwarded to the defendant, the owner, by Keys without any notification of the consideration just quoted, and the position accordingly was that the owner of the ship received the payment absolutely as in the course of business and without any condition whatsoever. Other payments, however, having fallen due, he declined to allow the ship to start: the condition or stipulation upon that topic was not made with him but between the charterer and sub-charterer, and was not communicated to the owner. In those circumstances the latter exercised his right of stopping the vessel. The amount of the cheque was undoubtedly due to the owner for value received. It was received unconditionally and bona fide and for value. In those circumstances it was held that Barnes remained liable on his acceptance.

It is here necessary to observe—what is indeed very elementary as a distinction—that the imposition of a condition has relation to the future, whereas a mistake in fact has relation to the past. When a document is granted, a deed signed or a payment made under a mistake in fact, that mistake has reference to occurrences which have taken place or things which have been done prior to or at the time of the transaction. In regard to these things mistakes occur. The true facts may not have been known to the grantor, or may have been misrepresented with such a result that the mind of the grantor does not go with the transaction at all; his mind goes with another transaction, and he is meaning to give effect to that other transaction depending upon facts different from those which were the true facts.

On the other hand, the imposition of a condition upon the making of a payment or the granting of a deed or the making of a transaction—the imposition of a condition as to what is to be done at the conclusion of the transaction or the receipt of the money—that affects the future, and

if that condition as a matter of obligation is not carried forward so as to reach the recipient of the money it cannot affect him. How this class of case can be said in any way to bear upon or modify a natural case of mistake in fact I am really at a loss to understand. I do not think that the case of *Watson* v. *Russell* (1) can bear such an interpretation as to make it apply to the circumstances of the present case, which are outstanding and clear, of a mistake in fact having been made.

LORD SUMNER. My Lords, so many points have been argued in this case, that it is necessary to settle at the outset what the facts are, in order to see which really arise. As no evidence was called, and the case was argued on admissions made by counsel, I think that we ought not to draw inferences of fact or go beyond those admissions. The material facts are as follows :—

(*a*) The action is brought for the return of the 5000*l.*, which the respondents got by cashing the 5000*l.* cheque. The previous cheques were incompletely signed; they were not cashed, and their return or cancellation did not constitute any consideration for the issue of the 5000*l.* cheque.

(*b*) Jones, Ld., would not have issued the 5000*l.* cheque if they had not thought that they were bound to deposit that sum with somebody under the contract signed with International Motors on December 31, 1919, and also that payment to Waring & Gillow, Ld., would discharge their obligation in a manner that would safeguard themselves. There was no question of fictitious payees. They knew Waring & Gillow, Ld., and meant their cheque to be cashed by them. They had been told that the relation between Waring & Gillow, Ld., and International Motors was a close one, though they were not identical concerns, and, believing this, they proposed to Bodenham to make the cheques for the 5000*l.* deposit payable to Waring & Gillow, Ld., to which he readily assented. They issued it to discharge their obligation, and there being no obligation in fact, the money was paid to Waring & Gillow,

(1) 3 B. & S. 34; 5 B. & S. 968.

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Ld., under a mistake of fact, a mistake arising directly between these two companies.

(*c*) Bodenham never had any mandate from Jones, Ld., to say anything to or to deal with Waring & Gillow, Ld., on their behalf. He was a carrier of the cheques given to him but, so far as Jones, Ld., were concerned, he was nothing more.

(*d*) The question, which of two innocent persons is to suffer by a third party's fraud, and the proposition, that some one "acts to his detriment on the faith of" something done by another, never seem to me clear in themselves. The question assumes, that the law must in such a case interfere on behalf of one or the other. This does not follow without more. "Acting on the faith" may only mean "acting in the belief" or "because of." Something more is required for estoppel. Jones, Ld., did not stand by and watch Waring & Gillow's change of position before making a claim. The most that can be said is that Waring & Gillow, Ld., took the cheque and ascertained that it would be paid, as it was. Jones, Ld., made no promise not to ask for the money back, but, if they had done so, it would not have estopped them. No representation was made by or on behalf of Jones, Ld., to Waring & Gillow, Ld. If Waring & Gillow, Ld., changed their position towards Bodenham after he brought the cheques, that was because they thought he had greater pecuniary resources than they had supposed and, in so far as they thought so because of what he said or did, Jones, Ld., had no responsibility for his words or acts. I am unable to take the view, on the admissions made, that, by the production of the two cheques by Bodenham, Waring & Gillow, Ld., were led to believe (what was not the fact) that Jones, Ld., were their debtors, or that they were brought to them by him on the part of Jones, Ld., for such purposes as Bodenham on his part might happen to state. How the case would have stood had all this been proved in fact, I need not, therefore, discuss. I will only add that the *Kramrisch* cases (*Continental Caoutchouc Co.* v. *Kleinwort* (1)

(1) 9 Com. Cas. 240.

and *Kleinwort* v. *Dunlop Rubber Co.* (1)), particularly Lord Loreburn's proposition in 97 L. T., at p. 264, and *Kerrison's* case (2), all refer to the defence to a claim for money paid under a mistake of fact, which an agent may set up, if, before discovery of the mistake, he has paid it over to the principal for whom he received it, but, as at present advised, I do not think they go further on the question of estoppel. The direct communications between Jones, Ld., and Waring & Gillow, Ld., by telephone or letter, did not constitute representations by Jones, Ld., nor was it on the faith of anything so said or written that Waring & Gillow, Ld., changed their position towards Bodenham. There was no duty between Jones, Ld., and Waring & Gillow, Ld., and, without that, the wide proposition of Ashhurst J. in *Lickbarrow* v. *Mason* (3) would not apply (see observations of Lord Macnaghten and Lord Lindley in *Farquharson & Co.* v. *King & Co.* (4), and of Lord Parmoor in *London Joint Stock Bank* v. *Macmillan* (5), which were apparently overlooked in *Commonwealth Trust* v. *Akotey* (6)). In the following cases a duty is the distinguishing feature, either that of banker to customer or arising in some similar relation (*Deutsche Bank* v. *Beriro* (7); *Holt* v. *Markham* (8)), or a duty as agent (*Lloyds Bank* v. *Cooke* (9)), or a duty such as existed in *Durrant* v. *Ecclesiastical Commissioners.* (10)

(*e*) I do not think that either party acted negligently, that is, in the absence of any duty to one another, imprudently or without ordinary caution. The point is probably immaterial.

Jones, Ld., are accordingly entitled to recover the 5000*l.*, as money paid under a mistake of fact, unless Waring & Gillow, Ld., can establish some special defence. For this purpose reliance is placed on *Watson* v. *Russell* (11) and especially on the dictum of Crompton J. As to the latter,

(1) 97 L. T. 263.
(2) 17 Com. Cas. 41.
(3) 2 T. R. 63, 70.
(4) [1902] A. C. 325, 335, 342.
(5) [1918] A. C. 777, 836.
(6) Ante, p. 72.
(7) 73 L. T. 669.
(8) [1923] 1 K. B. 504.
(9) [1907] 1 K. B. 794.
(10) 6 Q. B. D. 234.
(11) 3 B. & S. 34, 38; 5 B. & S. 968; 34 L. J. (Q. B.) 93, 94.

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it goes beyond the facts of the case, at any rate so far as any false pretence is concerned. Keys has constantly been treated as having been the agent of Russell, and in the text-books the case is classed under the head of fraud by an agent or of an agent exceeding or disregarding his authority. This is so, for example, in the 9th edition of Byles on Bills (p. 159, note (*c*)), the last for which Byles J. was responsible, and the later editions make no change. The 8th edition of Chalmers on Bills of Exchange treats Keys as "ostensibly" the agent of Russell (pp. 62, 112). In the Exchequer Chamber, Brett for the appellant calls Keys an actual agent, and the Court, in dismissing the appeal, says nothing to the contrary and nothing in approval of the proposition of Crompton J. The decision is purely one upon the law of the negotiation of cheques, and it is in this sense that it was approved in *Currie* v. *Misa* (1), in the words: "the holder of a cheque may either cash it immediately, or he may hold it over for a reasonable time. If he cashes it immediately he is safe. The maker of the cheque cannot afterwards repudiate, and claim back the proceeds any more than he could claim back gold or bank notes." In my opinion Keys had a mandate from Russell —namely, to deliver the cheque to Watson only on a condition. He delivered the cheque and forgot to mention the condition, and thus was, as Scrutton L.J. says, an agent with a secret limitation of his ostensible authority, which he disregarded. The actual case is therefore distinguishable on the facts. Further, the present case cannot be brought within the terms of the proposition of Crompton J., whether or not that is beyond criticism. There is no admission that the cheques were got by Bodenham by means of any promise or condition, and I think the admission made is to the contrary, and that Jones, Ld., thought they would make themselves safe by making the cheques payable to people they knew, without whose indorsement Bodenham would be helpless. It is only in the Court of Appeal that there

(1) (1875) L. R. 10 Ex. 153, 162.

is any reference to what Bodenham was to say to Waring & Gillow, Ld. Scrutton L.J. (Record, p. 106) says that "'Of course,' Messrs. Jones meant Bodenham to say to Waring & Gillow, Ld., 'these cheques are in respect of a deposit,'" but counsel never admitted that. Sargant L.J. says (p. 110) that Bodenham procured the cheques "by means of false pretences or promises," not saying what nor having any materials for doing so. Pollock M.R., however, says (p. 96), that "the purpose for which Bodenham was entrusted with the cheques, was in order that he might be the means of transit." I think this is right, being in conformity with the admissions, and that we should go no further. If so, nothing in *Watson* v. *Russell* (1) is in point now. Here the two cheques were "given" to Bodenham only, as they might have been "given" to a boy messenger. He was no party to the instruments and had no right to "pay" them to Waring & Gillow, Ld., nor did Waring & Gillow, Ld., "receive" them from him for value. They were imperfectly signed in any case and never were acted on. Equally the principle of *Perry Herrick* v. *Attwood* (2) and *Brocklesby* v. *Temperance Permanent Building Society* (3) is inapplicable, since Bodenham was in no sense an agent for Jones, Ld.

It is not necessary to decide whether Waring & Gillow, Ld., could have sued on the 5000*l.* cheque, as holders in due course, since the cheque was paid. As at present advised, I do not think Fletcher Moulton L.J.'s observations in *Lloyds Bank* v. *Cooke* (4) are correct, the effect of ss. 2, 21, sub-s. 2; 29, sub-s. 1; and 31 of the Bills of Exchange Act having been misapprehended.

It seems to me further that, even if Waring & Gillow, Ld., could have sued Jones, Ld., to judgment on the cheque for 5000*l.*, this would not conclude the matter, unless it were also held that no cross-action for money had and received would also lie, which I am not now prepared to say.

The real grievance of the respondents is, that it is hard

(1) 3 B. & S. 34; 5 B. & S. 968.
(2) (1857) 2 De G. & J. 21.
(3) [1895] A. C. 173.
(4) [1907] 1 K. B. 794, 805–7.

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to make them suffer because Jones, Ld., made a mistake. If it is any satisfaction to them, I am willing to say that I think it is, but such is the law. It might be a good thing if the Statutes of Limitation were amended, so as to cut down to a very short period the time within which actions such as *Kelly* v. *Solari* (1) and others may be brought; but the present case at any rate was very promptly begun, and intrinsically the hardship is not as great as it seems to be at first sight. It is the peculiar character of coin or currency that gives rise to this idea. If a tradesman misdelivers goods, so that the wrong person gets them, many laymen and all lawyers recognize at once that they do not thereby become the property of the receiver, for passing of property is a question of intention, and obviously the tradesman never meant in such circumstances to make his goods the property of the wrong man. When goods are found, the maxim that finding is keeping attracts many people, but not without a strong subconsciousness of guilt. In the case of payments of money, however, the notion is common that, if some one pays me money when he need not do so, it is my windfall, for I am not bound to keep his accounts for him. This is where the fallacy comes in. I may not be bound to know the payer's accounts but I ought to know my own. The executrix of Solari ought to have known, and probably did, that the company had cancelled the policy, and was making a mistake in paying again. If so, there was no real intention on the company's part to enrich her. So here: Waring & Gillow, Ld., must be taken to have known that Jones, Ld., were not their debtors. If so, and without more, there was no intention of making the 5000*l.* theirs in any event. Doubtless when that plausible person, Mr. Bodenham, brought them two cheques with an attractive tale, they honestly and readily concluded that he was deserving of more credit than they had supposed, and, as good tradesmen must, they proceeded with his business in a spirit of trust and not in one of suspicion, but at bottom they took Bodenham's story for what it was

(1) 9 M. & W. 54.

worth, and cashed the cheque at their own peril. The case is quite different, where, as in *Skyring* v. *Greenwood* (1), the payers are under an obligation to inform the payee of the true state of his account and, disregarding this obligation, pay him more than he was entitled to. The payment is then at their risk and they must stand by it. Accordingly I think that the appeal succeeds.

LORD CARSON. My Lords, I agree with the noble Viscount on the Woolsack that, apart from the other considerations by way of defence to which the noble Lord refers, there could be no doubt as to the right of the appellants to succeed in this action upon the ground that the 5000*l.* which is in controversy was paid under a mistake of fact. Upon reading the judgment of the Court of Appeal, I am of opinion that the real difference which arises between the conclusions at which that Court arrived and those at which I have arrived is based upon the different views which they and I respectively have formed as to the inferences to be drawn from the evidence. The Master of the Rolls has in the main decided the question upon the ground that there was no such mistake of fact as would entitle the appellants to recover; Sargant L.J. states specifically that he had come to a perfectly clear conclusion that there never was a representation made by Bodenham at all to Messrs. Jones that he was the agent of Messrs. Waring & Gillow; whilst Scrutton L.J., in approaching the case on this branch of the matter, states as follows: "Thus we come to the much more difficult branch of the case as to whether there was such a mistake of fact here on the part of anybody, or on the part of persons who are relevant to a mistake of fact, that the money can be recovered under an action for money had and received as it has been explained in the cases which have been decided."

Upon the other hand, the learned judge, Lord Darling, who tried the case, was of opinion that the money in question was money paid under a mistake of fact.

(1) 4 B. & C. 281.

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Lord Carson.

Now, the principles upon which such an action is to be decided are clearly stated in the judgments of Parke B. and Rolfe B. in the case of *Kelly* v. *Solari*. (1) Parke B. says: "I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it." Rolfe B. states the proposition as follows: "With respect to the argument, that money cannot be recovered back except where it is unconscientious to retain it, it seems to me, that wherever it is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him, it cannot be otherwise than unconscientious to retain it." I do not think that there is any authority which modifies that clear and concise statement, and the question is: Do the facts proved bring this case within the principles so laid down?

I agree with the noble Viscount that the mistakes of fact which were induced by the false statements of Bodenham —namely, that he represented a firm called International Motors, that that firm had control of a car called "Roma" —a picture of which was produced, and which was described as an existing car—and that the respondents were financing the firm and were the principals behind him and behind International Motors, were such mistakes of fact as to entitle the appellants to recover the money which they had paid on a belief that those facts were true. One admission made in the course of the trial by the counsel representing the respondents goes, I think, to the very root of the matter. When Lord Darling said to the said counsel: "The plaintiffs' case is that they believed they were paying 5000*l.* to the defendants in respect of motor cars sold to them by the defendants," the learned counsel replied: "That is right."

The one difficulty that I felt in the course of the argument was as to the effect of the provisions of the Bills of Exchange

(1) 9 M. & W. 54, 58, 59.

Act, 1882, and as to whether Mr. Jowitt might not be right in his contention that if the respondents had brought an action against the appellants upon the cheque for 5000*l.*, they would be entitled to rely upon the fact that they were holders in due course of the said cheque, having regard to the provisions of s. 21, sub-s. 2, of the Bills of Exchange Act, 1882. I am, however, now convinced, and in that I agree with the noble Viscount on the Woolsack, that the term "holder in due course" cannot be held to include the original payee of the cheque, and for the reasons stated by the noble Viscount I further agree with him that the decision of Lord Russell in *Lewis* v. *Clay* (1) upon this point was right, and is to be preferred to the contrary opinion expressed by Fletcher Moulton L.J. in *Lloyds Bank* v. *Cooke*. (2) In my opinion, having come to these conclusions, in the absence of any other defence the appellants are entitled to succeed in the action.

But another question has been raised arising out of the decision of *Watson* v. *Russell*. (3)

Before dealing with that case, I think it is not unimportant to observe that the judgment of Scrutton L.J. examines the authorities upon the basis that Bodenham is to be treated in the present case as the agent of the appellants in handing over the original cheques to the respondents. He says in the course of his judgment (4): "It appears to me that the facts here are the same as in a case where an agent with a secret limitation acts in excess of that limitation, and the person with whom he acts, who is ignorant of the secret limitation, is not bound by the secret limitation and can treat him as having the authority which he professes to have." Sargant L.J. takes the same view. He says: "It seems to me there is one question of fact which is of very great importance in this case, and that is the question, not whether Bodenham was in fact the agent of Messrs. Waring & Gillow—everybody knows he was not—but whether Bodenham represented himself to the plaintiffs, Messrs. R. E. Jones & Co., as being the agent of Messrs. Waring

(1) 67 L. J. (Q. B.) 224; 14 Times L. R. 149.
(2) [1907] 1 K. B. 794.
(3) 3 B. & S. 34; 5 B. & S. 968.
(4) [1925] 2 K. B. 640, 641.

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& Gillow—because that may affect very definitely the capacity in which the cheques were handed to Bodenham to hand to Messrs. Waring & Gillow." And it is in that context that he makes the further statement to which I have already referred, that he had come to a perfectly clear conclusion that we must take it that there never was a representation made by Bodenham at all to Messrs. Jones & Co. that he was the agent of Messrs. Waring & Gillow.

My Lords, I cannot agree with these conclusions from the evidence. In his opening statement, which was accepted as a correct view of the facts, the learned counsel for the appellants specifically stated that the respondents were the principals and that the cheques were given to Bodenham to take to the defendants, Bodenham representing himself to be acting as the agent of the defendants, and without going through the evidence which seems to me to support this conclusion, I think that the learned judge was entitled to come to the conclusion that Bodenham had purported to be the agent of Messrs. Waring & Gillow, and that it was in the belief that he was such that they handed to him the cheques made payable to Waring & Gillow.

Under the circumstances, I find it impossible to come to the conclusion that Bodenham can be treated, either as a matter of fact or as a matter of law, as the agent of the appellants in conveying the cheques to the respondents. Having come to that conclusion, I do not myself see how the case of *Watson* v. *Russell* (1) can be held to rule, or indeed to have any bearing upon, the present case. In the first place, in *Watson* v. *Russell* (1) there was no mistake of fact whatsoever. In the second place, there was an existing contract upon which a sum was due, and for which the money entrusted to Keys was rightly applicable, and which had to be paid either by the plaintiff as agent for the sub-charterers or by Keys, the original contracting party, if the terms of the charterparty were to be fulfilled. And in my opinion, the plaintiff in that case, in handing the cheque to Keys, though no doubt with an intimation that it was given in consideration

(1) 3 B. & S. 34; 5 B. & S. 968.

that the ship should perform the charter, constituted Keys his agent. The case, therefore, is not one of money paid under a mistake of fact, but is one, like many others that were cited in the course of the argument before us, where an agent acts either in excess of his duty, or contrary to his instructions, or even fraudulently, and the loss, if any such occurs, has to be borne, not by the payee, but by the principal, and that, I think, will be found to be the distinguishing feature in all the cases that have been cited in aid of the case put forward by the respondents.

The passage relied upon by the respondents in the judgment of Crompton J. goes further than the facts of the particular case, and does not seem to me to have been necessary for the decision on the facts before the Court.

I would further point out that although that case was decided as far back as the year 1862, there is nothing, as has already been pointed out, in the Bills of Exchange Act, 1882, which confers such a right as is there suggested upon the holder of a note or cheque procured in favour of a third party by false pretences, or a promise or condition which has not been fulfilled. Of course, if it could be shown that Bodenham was in any sense the agent of the appellants, the result would have been different, and indeed that was conceded in the course of the argument by the counsel on behalf of the appellants.

It is also argued that the decision of the Court of Appeal can be supported on the doctrine of estoppel.

My Lords, I am not sure that I quite understand from what particular contention, or in relation to what particular state of facts, it is alleged that the appellants are estopped, and if I am right in holding that Bodenham was not the agent of the appellants for the purpose of handing over the cheques, I fail to see how any conduct can be imputed to the appellants which can be said to have led to an alteration in the position of the respondents, or how any duty whatever was cast upon the appellants which they neglected to perform, and the neglecting of which caused the loss to the respondents. The case of *Kleinwort* v. *Dunlop Rubber Co.* (1)

(1) 97 L. T. 263.

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appears to me to be in no wise inconsistent with what I have just stated, as the payment, as found by the jury, was made to Kleinwort as agent for Kramrisch.

There is only one other matter to which I would like to refer—namely, a statement by Sargant L.J. which, although not the main ground upon which he allowed the appeal, he thought of sufficient importance to make a part of his judgment. He says (1): "In all these cases where the question is which of two innocent parties is to suffer, one cannot leave out of consideration the question which of the two innocent parties really has been guilty of carelessness or negligence or want of ordinary care," and he thereupon proceeds to find the appellants guilty because they chose to pay the money on the representations made to them by Bodenham, without communication with the respondents.

My Lords, this is a consideration which I must absolutely decline to enter upon. If I did, I would have to go into the whole circumstances of the dealings between the respondents and Bodenham, the dishonouring of his cheque, and the tender immediately afterwards of the two cheques in question drawn not in his favour but in favour of the respondents; a somewhat curious transaction where credit had been given to Bodenham for so many thousand pounds. No such inquiry has been prosecuted, and in my opinion there could be no more futile way of attempting to ascertain the rights of parties in an action of this kind. In my opinion, the appeal should be allowed and the judgment of Lord Darling restored.

Order of the Court of Appeal reversed, and judgment of Lord Darling restored. The respondents to pay the costs in the Court of Appeal, and also the costs of the appeal to this House.

Lords' Journals, June 18, 1926.

Solicitors for the appellants: *T. D. Jones & Co., for Edward Harris, Swansea.*

Solicitors for the respondents: *Finch, Jennings & Tree.*

(1) [1925] 2 K. B. 645.

[PRIVY COUNCIL.]

PALMER . . . . . APPELLANT; J. C.*

AND 1926

CAREY . . . . . RESPONDENT. *April* 19.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Equitable Assignment—Advances to Trader for Purchase of Goods—Agreement to pay Proceeds into Lender's Bank—Purchased Goods and Proceeds in Borrower's Hands—Bankruptcy.

By a written agreement made in 1917 a trader was to purchase goods from time to time and the respondent was to advance money to pay for them; the trader was to sell the goods and to pay the proceeds to the credit of the respondent at his bank; the respondent, after deducting the amount which he had advanced and one-third of the gross profits, was to pay the remaining two-thirds to the trader. In 1921 the trader became bankrupt, and the appellant was appointed assignee in the bankruptcy. At the time of the bankruptcy a large sum advanced under the agreement had not been repaid, and the trader had in his hands goods purchased under the agreement, and the proceeds of other goods so purchased. The respondent claimed a charge on the above assets in respect of the advances not repaid :—

Held, that as the agreement did not, either contractually or otherwise, create any right of the lender in either the goods or their proceeds, it did not amount to an equitable assignment so as to entitle the respondent to the charge claimed.

Judgment of the High Court of Australia reversed.

APPEAL (No. 54 of 1925) from a judgment of the High Court of Australia (June 10, 1924) reversing a judgment of the Chief Judge in Bankruptcy in New South Wales.

The appeal arose out of a motion in the Supreme Court of New South Wales in Bankruptcy in the bankruptcy of one A. E. Johnstone, the appellant being assignee in the bankruptcy. The respondent claimed that in respect of advances made by him to the bankrupt he was entitled, as the effect of an agreement of April 30, 1917, to a charge upon certain assets of the bankrupt.

The material facts are stated in the judgment of the Judicial Committee.

* *Present:* VISCOUNT CAVE L.C., LORD PARMOOR, LORD WRENBURY, LORD BLANESBURGH, and LORD DARLING.

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The trial judge (Street J.) held that the agreement did not amount to an equitable assignment, and that consequently the respondent was not entitled to a charge.

On appeal to the High Court of Australia, that Court (Isaacs and Starke JJ.; Knox C.J. dissenting) reversed the decision, being of opinion that there was an equitable assignment by the agreement. The judgment is reported at 34 Commonwealth L. R. 380.

1926. March 5, 8. *Clauson K.C.* and *Hon. Geoffrey Lawrence K.C.* for the appellant. The respondent was not entitled to a charge; the agreement does not purport to create any equitable right or interest in the bankrupt's property in favour of the respondent: *Smith* v. *Watson* (1); *Alfaro* v. *De la Torre.* (2) If the agreement created a charge it is void for want of registration under the Bills of Sale Act, 1898 (N. S. W.). The decision on that point in *Malick* v. *Lloyd* (3) was erroneous.

Their Lordships desired to hear the respondent's counsel on the question whether there was an equitable assignment before the question under the Act was further argued.

Sir John Simon K.C. and *Wilfrid Barton* for the respondent. The agreement amounted to an equitable assignment: *Rodick* v. *Gandell* (4); *Riccard* v. *Prichard* (5); *In re Irving* (6); *Holroyd* v. *Marshall* (7); *In re Lind.* (8) The two decisions relied upon for the appellant have no bearing.

Clauson K.C. replied.

April 19. The judgment of their Lordships was delivered by

LORD WRENBURY. The appellant is assignee in bankruptcy of the estate of one Alfred Edwin Johnstone, a trader. He was so appointed on June 21, 1921. The question on the appeal is whether an agreement dated April 30, 1917, made between Johnstone of the one part and the respondent of the other part is an equitable assignment. If it is not, no other

(1) (1824) 2 B. & C. 401.
(2) (1876) 34 L. T. 122.
(3) (1913) 16 Commonwealth L. R. 483.
(4) (1852) 1 D. M. & G. 763, 777.
(5) (1855) 1 K. & J. 277.
(6) (1877) 7 Ch. D. 419.
(7) (1862) 10 H. L. C. 191.
(8) [1915] 2 Ch. 345.

question arises. If it is, then inasmuch as the agreement was not registered under the Bills of Sale Act, a further question arises under that Act.

The trial judge held that the agreement was not an equitable assignment. The High Court of Australia, by a majority (the Chief Justice dissenting), held that it was. The assignee in bankruptcy appeals.

The facts are that in April, 1917, the bankrupt wanted to obtain money for the purchase of goods to be sold in his business of an indentor and importer, which he carried on in Sydney. The respondent, who may be called the lender, agreed to advance him money for this purpose, and the terms upon which the advances were to be made were expressed in the agreement of April 30, 1917. The effect of that agreement is as follows: The borrower was from time to time to purchase goods for his business and the lender was to advance the purchase money for them. The borrower was (art. 3) to sell the goods as soon as possible and to pay the proceeds of sale into the lender's credit at the lender's bank. The borrower (art. 4) was to be diligent in carrying on the business, and (art. 5) to keep proper books of account and give the lender access to them. A monthly account (art. 6) was to be furnished to the lender, and he, after deducting the amount he had advanced and one-third of the gross profits, was to pay the borrower the remaining two-thirds of the gross profits, and (art. 7) the agreement was not to constitute a partnership.

The amount to be advanced was originally fixed at 1000*l.* By verbal arrangement this was increased to 1500*l.*, and the lender's share of gross profits was increased to one-half. The 1500*l.* was advanced. Further sums were advanced, partly by the respondent's father and partly by the Commonwealth Bank, by way of overdraft on the lender's account. These amounts ultimately ran up to 18,990*l.* 16*s.* 3*d.* By letters dated May 31, 1921, and June 7, 1921, the lender, with knowledge that the borrower was financially embarrassed, entered into an agreement in writing with the borrower by which, in consideration of the release of this sum of

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18,990*l.* 16*s.* 3*d.*, the borrower assigned to the lender all the stock of his business.

On June 21, 1921, the bankrupt's estate was sequestrated and the appellant was appointed assignee in bankruptcy. The assignment of the goods in 1921 has been declared void, and the only question to be determined is whether the lender has, under the agreement of April 30, 1917, any charge upon or equitable interest in the stock-in-trade or the moneys in the hands of the lender.

The article in the agreement of April 30, 1917, upon which reliance was placed by the respondent and which the trial judge held did not create an equitable assignment was art. 3. That article, when stated in full, is as follows: "3. To sell such goods or stock as soon as possible after the purchase thereof and to pay the proceeds of such sale forthwith into the credit of the lender at the head office of the Commonwealth Bank in Sydney."

The law as to equitable assignment, as stated by Lord Truro in *Rodick* v. *Gandell* (1), is this: "The extent of the principle to be deduced is that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund, in other words, will operate as an equitable assignment of the debts or fund to which the order refers."

An agreement for valuable consideration that a fund shall be applied in a particular way may found an injunction to restrain its application in another way. But if there be nothing more, such a stipulation will not amount to an equitable assignment. It is necessary to find, further, that an obligation has been imposed in favour of the creditor to pay the debt out of the fund. This is but an instance of a familiar doctrine of equity that a contract for valuable consideration to transfer or charge a subject matter passes a beneficial

(1) 1 D. M. & G. 763, 777, 778.

interest by way of property in that subject matter if the contract is one of which a Court of equity will decree specific performance.

Their Lordships have to look at the agreement of April 30, 1917, with these principles in mind. Under art. 1 of that agreement the money when borrowed is the borrower's money, and the lender becomes a creditor. The goods when purchased are the borrower's goods. They have been bought with his money. There is nothing in the agreement to make them the lender's goods. The goods are to be sold. The proceeds of sale when the goods are sold belong to the borrower. They arise from the sale of goods belonging to him. Under art. 3, however, the proceeds are to be paid to the lender's credit at his bank. This gives the lender a most efficient hold to prevent the misapplication of the proceeds, but there is nothing in that article to give him a property by way of security or otherwise in the moneys of the borrower before or after he, the lender, has them in his charge. Art. 6 was not relied on as giving an equitable charge, and it is difficult to see how it could be relied upon for that purpose. It is an article determining the distribution between the parties in manner there defined of a fund which is in the hands of one of them.

Their Lordships, therefore, fail to find in the agreement any provision creating, contractually or otherwise, any right of property in either the goods or the proceeds of sale of the goods. The Chief Justice says : " The words of the agreement on which the appellant relies are apt to express a contract by the bankrupt to apply the money in the purchase of goods, to sell those goods, and to pay the proceeds of the sale into the appellant's bank account, but I can see nothing in them to indicate that the intention was to assign any interest in goods purchased by the bankrupt or to create either a charge over or a trust of such goods in favour of the appellant."

Their Lordships agree with this. In their judgment the trial judge and the Chief Justice are right, and this appeal must be allowed, and the order of the trial judge of

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December 19, 1923, restored with costs before the High Court of Australia and before this Board. The second question—namely, as to the Bills of Sales Act—therefore, does not arise.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Blake & Redden.*

Solicitors for respondent: *Rodgers, Gilbert & Rodgers.*

[PRIVY COUNCIL.]

J. C.* 1926 *May* 7.

UNITED MANUFACTURING COMPANY . APPELLANTS;

AND

ST. MAURICE POWER COMPANY, LIMITED, AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Canada (Quebec)—Company—Incorporation by Letters Patent—Power to construct Dam in River—Absence of Proprietary Right or Franchise—Companies Act (7 *Edw.* 7, *c.* 48, *Queb.*).

By letters patent issued by the Lieutenant-Governor of Quebec in 1910 under the Companies Act of that Province, the appellant company was incorporated for the purpose of carrying on the business of producers of electricity, and with power to construct and maintain dams in a river of the Province within certain limits, after having acquired from the riparian proprietors the properties necessary for that purpose. In 1923, the appellants not having then constructed any works, the Provincial Government granted to the respondents a lease of the water power and bed of the river within limits which overlapped those referred to in the appellants' letters patent. The appellants brought an action against the respondents, claiming a declaration that the appellants had a vested right in the river to construct dams, and an injunction:—

Held, that the action failed, since the letters patent contained no grant of a proprietary right in, or power to take possession of, any part of the river or its bed.

Judgment of the Appeal Side affirmed.

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* *Present:* VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW, and LORD PARMOOR.

APPEAL (No. 113 of 1925) from a judgment of the Court of King's Bench, Appeal Side, for Quebec (June 15, 1925), reversing a judgment of the Superior Court (November 15, 1924).

The appellants brought an action against the respondents in the Superior Court of Quebec for a declaration that they had vested rights in the St. Maurice River, to erect, construct, and maintain a dam therein at the points mentioned in their letters patent of incorporation, dated February 23, 1910; and for an injunction to restrain the respondents from doing any act or performing any operation in the river so as to interfere with the vested right claimed.

The Attorney-General for Quebec intervened.

The facts appear from the judgment of the Judicial Committee.

The trial judge (Maclennan J.) made the declaration prayed, and granted an injunction.

Upon appeal to the Court of King's Bench the decision was reversed and the suit dismissed. The grounds of the judgment appear from the judgment in the present appeal.

1926. April 22, 23. *Clauson K.C.* and *Chauvin K.C.* for the appellants.

Lafleur K.C. and *MacDougal K.C.* for the respondent company.

Lanctot K.C. and *M. Alexander* for the respondent Attorney-General.

[Reference was made to *Bonanza Creek Gold Mining Co.* v. *The King* (1); *John Deere Plow Co.* v. *Wharton* (2); *Maclaren* v. *Attorney-General for Quebec* (3); *Canadian Pacific Ry. Co.* v. *Roy.* (4)]

May 7. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Court of King's Bench (Appeal Side) for Quebec, which reversed a judgment of the Superior Court of the Province

(1) [1916] 1 A. C. 566.
(2) [1915] A. C. 330.
(3) [1914] A. C. 258.
(4) [1902] A. C. 220.

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given by Maclennan J. The latter judgment sustained an action of the appellants against the respondent company, and enjoined the latter from doing any act which might interfere with what was held to be the vested right of the appellants to construct a dam or dams across the St. Maurice River, a tributary of the St. Lawrence. It also dismissed the intervention of the Attorney-General. The principal questions in the case are, firstly, whether certain letters patent, dated February 23, 1910, issued by the Lieutenant-Governor of the Province of Quebec and forming the charter of incorporation of the appellant company, of themselves gave it any right of property or to take possession for the purposes of its undertaking of the bed or bank of any part of the St. Maurice River, or of any part of the public property of the Province at the place in question. Secondly, whether, if the letters patent are to be interpreted as purporting to grant any such title, the Lieutenant-Governor had power to make such a grant. The letters patent were issued under provisions of the Quebec Companies Act, 1907, which enacted that he might by letters patent under the Great Seal create and constitute bodies corporate for any of the purposes or objects to which the legislative authority of the Province extended (excepting railways and insurance). By s. 21 it was provided that the corporation so created might acquire, hold and alienate immovable property requisite for the carrying on of the undertaking, and should forthwith become and be invested with all property and rights, movable and immovable, theretofore held by it or for it under any trust created with a view to its incorporation, and with all the powers, privileges and immunities requisite or incidental to the carrying on of its undertaking. By the letters patent, which were issued under this statute, the appellant company was constituted a corporation to carry on the business of manufacturers of electricity, and for this purpose to erect, construct and maintain a dam or dams in, over or across the St. Maurice River extending from within the limits of certain designated lots on one side of the river to certain designated lots on the other side, after having acquired from the riparian

owners the properties necessary for the purpose. The company was, however, before constructing such works, to obtain permission from the Governor-General in Council (navigation being under Dominion jurisdiction), and the dams when constructed were to be such as would enable the water to be dammed up. The St. Maurice is a navigable river.

Such was the title of the appellant company under its letters patent. Although they were granted in 1910 it has not yet constructed any works. Nor has it obtained any further title than whatever the letters patent conferred.

In 1919 the respondent company was incorporated by letters patent issued under the seal of the Secretary of State of the Dominion Government. Later on, on February 27, 1923, the respondent company obtained from the Government of Quebec an emphyteutic lease, which transferred to it with alterations the benefit of a similar lease granted in 1916 to another company, the St. Maurice Lumber Co., and which granted to the respondent company certain parts of the water power and the bed of the St. Maurice River for a term of ninety-nine years, such parts overlapping what the appellants claim to have had granted to them by the letters patent of 1910.

On March 5, 1923, the appellants commenced the action against the respondent company, out of which this appeal arises, claiming a declaration of the vested rights of the appellants in the river to construct dams and otherwise, and an injunction in accordance with this declaration. The respondent company pleaded, denying the appellants' title and setting up its own lease. The Attorney-General of the Province intervened to support this defence. The case was tried in the Superior Court before Maclennan J., who gave judgment on November 12, 1924, for the appellants, the plaintiffs. He held that the issue by the Lieutenant-Governor of the letters patent in 1910, under the authority of the Quebec Companies Act and of his other powers, created the appellants a corporation for the purpose of constructing and maintaining the dams in question, and that the letters

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patent, although they did not grant the ownership of the waters, bed or banks, did grant a franchise to place dams at specified points. The river being a navigable one was a dependency of the Crown Domain, and its beds and banks stand in a different position in law from public lands owned by the Province in absolute ownership, so that the restrictions which apply in the case of the latter do not apply in that of the former. The letters patent purported to grant no more than a privilege or licence, and the Crown retained its power under the common law to grant this. It was on these grounds that he decided in favour of the appellants.

The respondent company and the Attorney-General appealed to the Court of King's Bench. The appeal was heard by Flynn, Guerin, Allard, Bernier and Rivard JJ., who unanimously, on June 15, 1925, reversed the judgment of Maclennan J. and dismissed the action.

Flynn J., in an elaborate opinion, laid down, first, that the letters patent of 1910 did not grant to the appellants any right of property or other right to take possession, but only capacity to carry out the undertaking for which there was incorporation; and, secondly, that if the letters patent had purported to grant right of property or to take possession, it was not within the power of the Lieutenant-Governor to make such a grant. The other learned judges in the King's Bench concurred with Flynn J. in his first ground, but did not desire to express any opinion on his second point. It was therefore unanimously held that there was no occasion to decide it.

The first question which their Lordships have to consider is whether the letters patent of 1910 contained a grant to the appellants of any right of property or any power to take possession of part of the river. These letters patent were not granted in Council, but on the face of them purport to be an exercise of a power conferred on the Lieutenant-Governor by the Quebec Companies Act of 1907 to constitute a corporation for definite purposes or objects. Under the instrument in question these objects and purposes are defined to be the carrying on of the business

of manufacturers of electricity. For this purpose (which includes generation from water power as well as from steam or any other power) the corporation is to have power to construct the dams in question, after having acquired from the riparian proprietors the properties necessary for the purpose; to distribute electricity within certain counties, after obtaining the proper consents; and to acquire, purchase or lease any such real estate, immovable property and water power as may be requisite or convenient for the purposes of the company. Other incidental powers are bestowed on it, all of which, unless it be in the instance of the power to construct dams, are in the nature of mere grants of capacity, as distinguished from proprietary grants.

On the question of whether the letters patent were issued for the purpose of effecting a grant, or whether they were issued merely in order to incorporate, under the provisions of the statute referred to, those who petitioned for them, it is to be observed that, as the correspondence and the terms of the petition show, the footing on which the petitioners proceeded was that, in their view, the river was not navigable at the place where the works were to be made, and that consequently the matter was not one in which the Dominion Government had to be approached. Further, that, before the dams across the river were constructed, the company would acquire from the riparian proprietors the properties necessary for this purpose (a proposal which is hardly quite consistent with the view that the property in and control of the bed of the river was with the Province, as distinguished from the riparian owners who would control in the case of a non-navigable stream). Still further, it is to be noted that all that the petitioners paid to the Provincial authorities was, not a price for a franchise or a right of property, but only the usual fee of 130 dollars for the issue of letters patent. In addition to all this there was no application to the Minister of Lands and Forests charged with the control and administration of the public lands of the Province, which included the beds of its navigable rivers.

Having regard to these considerations as well as to the

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character of the letters patent their Lordships are in agreement with the unanimous view of the Court of King's Bench, that this instrument conveys no right of property or franchise to take possession of any part of the public or other property. If its language can be said to be ambiguous it is open to the comment that in a question with the Crown such ambiguous language must be construed in favour of the Crown and not against it.

A further point was taken by Flynn J. He considered that even if the letters patent could be construed as purporting to make such a grant as that under discussion, the Lieutenant-Governor, acting as he did in 1910, had no power to make it. Into this question the other learned judges thought it unnecessary to enter, because the first point was sufficient to dispose of the case. Flynn J. himself adopted this view. Their Lordships, without intending thereby to express any dissent from the opinion of Flynn J. on the second point, think that the course thus taken was right. They propose to follow the course adopted in the Court of King's Bench.

For the reasons now given they will humbly advise His Majesty that this appeal should be dismissed with costs to the respondents. The intervener, the Attorney-General for Quebec, will bear his own costs.

Solicitors for appellants: *Parker, Garrett & Co.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR QUEBEC . APPELLANT;

AND

NIPISSING CENTRAL RAILWAY COMPANY AND ATTORNEY-GENERAL FOR CANADA . . . . . RESPONDENTS.

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Power—Dominion Railway—Expropriation of Provincial Crown Lands—Railway Act, 1919 (9 & 10 *Geo.* 5, *c.* 68), *s.* 189—*British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *ss.* 91, 92.

Sect. 189 of the Railway Act, 1919, of Canada, which empowers any railway company, with the consent of the Governor-General, to take Crown lands for the use of the railway, applies to Provincial Crown lands as well as to Dominion Crown lands.

The enactment was within the legislative powers of the Parliament of Canada under s. 91, head 29, and s. 92, head 10, of the British North America Act, 1867.

Although sub-s. 4 of s. 189 contemplates that the compensation for Crown lands taken will be paid to the Governor in Council, there is no reason why he should not direct that any compensation received in respect of Crown lands of a Province should be handed over to the Government of that Province.

Judgment of the Supreme Court of Canada [1926] S. C. R. 163 affirmed.

APPEAL (No. 15 of 1926) by special leave from a judgment of the Supreme Court of Canada dated December 10, 1925.

The Railway Act, 1919, of Canada, makes provision for the expropriation of lands for the purpose of railways, and for the payment of compensation for lands taken. By s. 189 a railway company, with the consent of the Governor-General in Council, may take Crown lands for the use of the railway.

The Governor-General referred to the Supreme Court questions as to the effect of the section, and its competence in relation to Provincial Crown lands.

The circumstances in which the reference was made, the terms of the questions, and of the section appear from the judgment of the Judicial Committee.

* *Present:* VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW, and LORD PARMOOR.

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The Supreme Court in a judgment delivered by Newcombe J. and concurred in by Anglin C.J. and Duff, Mignault and Rinfret JJ., held that the section, on its true construction, applied to Provincial Crown lands, and that it was competent under ss. 91 and 92 of the British North America Act, 1867. The judgment is reported at [1926] S. C. R. 163.

1926. April 19, 20, 22. *Sir John Simon K.C., Lanctot K.C.* (*Attorney-General for Quebec*), *M. Alexander*, and *Frank Gahan* for the appellant. Sect. 189 of the Railway Act, 1919, is ultra vires unless it applies only to Dominion Crown lands. By s. 117 of the British North America Act, 1867, the Provinces were to retain their respective public property not otherwise disposed of by that Act, and the Dominion was given a right to take them only if they were required for fortification or the defence of the country. The decision of the Supreme Court was based entirely upon *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (1) That decision is distinguishable on the following grounds. (*a*) The lands there in question were found to be part of a public harbour, and therefore Dominion property; though the right to appropriate Provincial Crown lands was mooted, it was not the subject-matter of the decision. (*b*) It was a term of the admission of British Columbia to the Union that that Province should provide lands for the purpose of the railway; the Order in Council approving the terms had, under s. 146 of the British North America Act, the force of an Imperial statute. (*c*) The trial judge (Duff J.) found that the Province had assented to the occupation of the lands by the railway company. (*d*) Neither of the cases cited in the judgment in that appeal—*Canadian Pacific Ry. Co.* v. *Notre Dame de Bonsecours* (2); *Toronto Corporation* v. *Bell Telephone Co.* (3)—dealt with the effect of Dominion legislation on Provincial Crown lands.

There is an essential distinction between the proprietary rights of a Province in Provincial Crown lands, and the

(1) [1906] A. C. 204. (2) [1899] A. C. 367.
(3) [1905] A. C. 52.

power of the Dominion to legislate as to Dominion railways; that power cannot be exercised so as to deprive a Province of lands vested in it at confederation: *Attorney-General for Canada* v. *Attorney-General for Ontario* (the first *Fisheries* case) (1); *Ontario Mining Co.* v. *Seybold* (2); *St. Catherine's Milling and Lumber Co.* v. *The Queen* (3); *Attorney-General for Canada* v. *Attorney-General for Quebec* (4); *Montreal City* v. *Montreal Harbour Commissioners.* (5) Sect. 189, now in question, is substantially a reproduction of the Consolidated Statutes of Canada, 1859, c. 66, s. 133, and should be construed as applying to Dominion Crown lands, not to lands expressly conferred on the Province at confederation. Sub-s. 4 of s. 189 is inconsistent with the view that the section authorizes the taking of Provincial lands. There has never been an instance of Provincial Crown lands being taken by the Dominion for railway purposes without the consent of the Provincial authorities. [Reference was made also to the British North America Act, 1867, ss. 12, 65, 91 (heads 7, 12, 24, 29), 92 (heads 5, 10, 11, 13), 129, 145, 146; *Montreal City* v. *Montreal Street Ry. Co.* (6); *Madden* v. *Nelson and Fort Sheppard Ry. Co.* (7)]

Lafleur K.C., *Clauson K.C.* and *T. Mathew* for the respondent, the Attorney-General for Canada; *Tilley K.C.* and *Pritt* for the respondent railway company. Sect. 189 of the Railway Act is intra vires, and applies to Provincial as well as to Dominion Crown lands. The power expressly given by s. 117 of the British North America Act, 1867, to take Provincial land for the defence of the country, refers to executive and not legislative action. That section does not mean that the Provinces shall retain their public property for all time, but merely that upon confederation each Province shall retain its own public property; for instance it must be read in conjunction with the power of sale given by s. 92,

(1) [1898] A. C. 700, 713.
(2) [1903] A. C. 73, 79.
(3) (1888) 14 App. Cas. 46, 56.
(4) [1921] 1 A. C. 413, 432.
(5) Ante, pp. 299, 313.
(6) [1912] A. C. 333.
(7) [1899] A. C. 626.

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head 5. The Dominion had legislative power to pass s. 189 under s. 91, head 29, and s. 92, head 10 (*a*), of the British North America Act, 1867. It is a necessary implication under those heads that the Dominion can take Provincial lands necessary for a Dominion railway. That power is an exclusive power: *Wilson* v. *Esquimalt and Nanaimo Ry. Co.* (1) The section now in question was strictly railway legislation in its "pith and substance." In *Montreal City* v. *Montreal Harbour Commissioners* (2) the Board expressly observed that that case was not one to which s. 92, head 10, applied. Sect. 189 of the Railway Act would be intra vires even if payment of compensation was not contemplated; but sub-s. 4 appears to contemplate compensation being paid. The section does not contemplate a transfer of the property in the land, but merely the user of it for the purposes of the railway. It was merely that right which was held to have been taken in *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (3) That decision is conclusive in the respondents' favour. The grounds upon which the appellant contends that it is not applicable have no weight. The holding as to the legislative competence to take Provincial land was a deliberate decision, intended to have equal weight with the decision based upon the view that the land was a public harbour. That decision was not based upon the agreement contained in the Order in Council; the agreement had no bearing upon the acquisition of land for the purposes of the railway. The two cases referred to in the judgment in that appeal supported the decision as to the power of the Dominion Legislature, and apply—more especially *Toronto Corporation* v. *Bell Telephone Co.* (4)—in the present case. The language of the Act of 1859, of which s. 133 is substantially reproduced in s. 189 now under discussion, shows (e.g., see s. 9, sub-s. 3) that the Act dealt with what are now Provincial public lands. The present distinction between Dominion and Provincial Crown lands did not then exist.

Lanctot K.C. in reply. The provisions of the Railway

(1) [1922] 1 A. C. 202.
(2) Ante, pp. 299, 312.
(3) [1906] A. C. 204.
(4) [1905] A. C. 52.

Act, 1919, ss. 162 (*a*), 166, 167, 168, 215, as to the expropriation of land do not apply to Crown lands.

May 17. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. The Nipissing Central Railway Co. was incorporated by an Act of the Dominion of Canada (No. 112 of 1907) for the purposes of constructing and operating certain lines of railway, including a line extending from Latchford, in the Province of Ontario, to a point on the line of the Grand Trunk Pacific Railway in the Province of Quebec. The plan and book of reference for this line, as approved by the Board of Railway Commissioners, show a line traversing lands belonging to the Crown in right of the Province of Quebec. The statute governing the construction and operation of inter-Provincial railways in Canada (other than Government railways) is the Railway Act of 1919 of Canada, which provides for the compulsory taking of lands required for a railway and for the payment of compensation for lands so taken, and the section of the Act dealing specially with Crown lands is s. 189, which is in the following terms :—

"(1.) No company shall take possession of, use or occupy any lands vested in the Crown without the consent of the Governor in Council.

"(2.) Any railway company may, with such consent, upon such terms as the Governor in Council prescribes, take and appropriate for the use of its railway and works so much of the lands of the Crown lying on the route of the railway which have not been granted or sold as is necessary for such railway, and also so much of the public beach or bed of any lake, river or stream, or of the land so vested covered with the waters of any such lake, river or stream as is necessary for making and completing and using its said railway and works.

"(3.) The company may not alienate any such lands so taken, used or occupied.

"(4.) Whenever any such lands are vested in the Crown for any special purpose, or subject to any trust, the compensation money which the company pays therefor shall be

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held or applied by the Governor in Council for the like purpose or trust."

In pursuance of this section, the Nipissing Co. applied for the consent of the Governor-General in Council to the taking, for the purposes of its railway, of the Provincial Crown lands lying on the approved route; and the Government of the Province of Quebec having disputed the right of the Governor in Council to give an effective consent, the Governor in Council, under s. 60 of the Supreme Court Act, referred the questions so raised to the Supreme Court of Canada for hearing and consideration. The questions referred to the Supreme Court, with the replies given by that Court, are as follows :—

First question : Is it within the competence of Parliament to enact the provisions of s. 189 of the Railway Act, 1919, with regard to Provincial Crown lands ? Answer : Yes.

Second question : If the answer to question 1 be in the affirmative, is said s. 189, as it now stands, applicable to Provincial Crown lands ? Answer : Yes.

Third question : Is it obligatory upon the Governor in Council to give his consent under the provisions of sub-s. 2 of said section upon any proper application therefor, or has he discretion to grant or refuse such consent as he may think fit ? Answer : It is not obligatory upon the Governor in Council to give his consent, and he has in point of law discretion to grant or refuse such consent as he may see fit.

Against this judgment the Attorney-General for Quebec has appealed to His Majesty in Council.

As to the third of the above answers, no question is raised on this appeal; and, as the first question does not arise unless the second is answered in the affirmative, it is convenient to take the latter question first.

Their Lordships do not feel any doubt that s. 189 of the Railway Act applies, according to its true construction, to lands belonging to the Crown in right of a Province. The section applies in terms to all "lands of the Crown lying on the route of the railway," no distinction being made between Dominion and Provincial Crown lands. It is true that the only consent required by the section is that of the

Governor in Council; but if any executive consent was to be required to the taking of Crown lands for the purposes of a Dominion railway, it was to be expected that the consent required would be that of the Dominion Government, for otherwise the construction of the railway would be dependent upon the consent of the Government of each Province through which it was intended to pass. It is true also that sub-s. 4 of the section appears to proceed on the assumption that all compensation money for Crown lands taken will be payable to the Governor in Council, and it is suggested that this would not be the natural destination of compensation paid in respect of lands in which the beneficial interest belongs to a Province; but this sub-section is machinery only, and there is no reason why the Governor in Council should not direct any compensation moneys received in respect of Provincial Crown lands to be handed over to the Government of the Province concerned.

The construction so put upon s. 189 of the Act of 1919 is strongly supported by a reference to the history of the Railway Acts, which were carefully analysed in the judgment delivered by Newcombe J. on behalf of the Supreme Court in this case. The pre-Union Railway Act of the Province of Canada (22 Vict. c. 66) authorized the taking of any "wild lands of the Crown" situate on the route of the railway; and this expression was repeated in the Railway Act passed immediately after confederation (the Railway Act, 1868) at a time when all such "wild lands" were necessarily Provincial Crown lands. It reappeared in the Railway Acts of 1879 and 1886, the word "wild" being omitted in the Act of 1888 and in all subsequent consolidating Acts down to and including the Act of 1919; and it is hardly conceivable that an expression which in the earlier of these statutes plainly included Provincial Crown lands was intended to have a less extended meaning in the later statutes. It is noteworthy too that the Act of 1919 was passed after it had been decided in the British Columbia case (to be hereafter referred to) that the section extended to Provincial Crown property, and without any alteration of language.

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Assuming then that the section, on its true construction, extends to the compulsory taking of Provincial Crown lands, was it within the competence of the Dominion Parliament to enact it? In other words, does the exclusive power to legislate in respect of inter-Provincial railways reserved to the Dominion Parliament by s. 91, head 29, and s. 92, head 10, of the British North America Act, 1867, empower that Parliament to authorize the compulsory taking of lands on the route of a Dominion railway which belong to the Crown in right of a Province? This question has already been considered by this Board in connection with the corresponding section of the Railway Act, 1888, and has been answered in the affirmative: *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (1) Sir Arthur Wilson, in announcing the decision of the Board in that case, used the following language: "It was argued for the appellant that these enactments ought not to be so construed as to enable the Dominion Parliament to dispose of Provincial Crown lands for the purposes mentioned. But their Lordships cannot concur in that argument. In *Canadian Pacific Ry. Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (2) (a case relating to the same company as the present) the right to legislate for the railway in all the Provinces through which it passes was fully recognized. In *Toronto Corporation* v. *Bell Telephone Co. of Canada* (3), which related to a telephone company whose operations were not limited to one Province, and which depended on the same sections, this Board gave full effect to legislation of the Dominion Parliament over the streets of Toronto which are vested in the City Corporation. To construe the sections now in such a manner as to exclude the power of Parliament over Provincial Crown lands would, in their Lordships' opinion, be inconsistent with the terms of the sections which they have to construe, with the whole scope and purpose of the legislation, and with the principle acted upon in the previous decisions of this Board. Their Lordships think, therefore, that the Dominion Parliament

(1) [1906] A. C. 204, 210. (2) [1899] A. C. 367.
(3) [1905] A. C. 52.

had full power, if it thought fit, to authorize the use of Provincial Crown lands by the company for the purposes of this railway."

This judgment appears to their Lordships to be conclusive of the question now under discussion. It is true that in the British Columbia case the Board found additional support for their conclusion in the circumstance that the land there in question (which was Provincial foreshore) had been used before the Union for harbour purposes. But a substantial, if not the principal, ground for the decision is to be found in the reasoning above cited from the judgment of Sir Arthur Wilson; and their Lordships would hesitate long before departing from an opinion so clearly and emphatically expressed by this Board even if they were not wholly in agreement with it. But, in fact, no argument has been adduced in the present case which would lead their Lordships to doubt in any way the correctness of the decision reached in the year 1906. It was suggested that the effect of s. 65 of the British North America Act was to vest in the Lieutenant-Governor of Quebec, and not in the Governor-General, the power to consent under s. 9, sub-s. 3, of the Canada Railway Act (22 Vict. c. 66) to the appropriation of Crown lands in the Province of Quebec for railway purposes; but the last-mentioned Act, although it does not appear to have been formally repealed, has been superseded by later Railway Acts, and no sound argument can now be founded upon it. It was further argued that the effect of ss. 109 and 117 of the British North America Act was to vest in each of the Provinces the beneficial interest in the Crown lands situate in the Province, subject only to the right of Canada under the reservation contained in s. 117 to assume lands required for purposes of defence. But the reservation in question appears to refer to executive, and not to legislative, action; and while the proprietary right of each Province in its own Crown lands is beyond dispute, that right is subject to be affected by legislation passed by the Parliament of Canada within the limits of the authority conferred on that Parliament. Reference was made to certain passages in judgments

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pronounced on behalf of the Board in earlier cases, in which emphasis was laid on the view that the regulative powers conferred upon the Dominion Parliament by s. 91 of the British North America Act did not authorize that Parliament to transfer to itself or others the proprietary rights of a Province. But those expressions must, of course, be taken subject to the observation of Lord Herschell in the first *Fisheries* case, *Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec and Nova Scotia* (1), that the power to legislate in respect of any matter must necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights; and it may be added that where (as in this case) the legislative power cannot be effectually exercised without affecting the proprietary rights both of individuals in a Province and of the Provincial Government, the power so to affect those rights is necessarily involved in the legislative power.

Upon the whole matter their Lordships find themselves completely in agreement with the judgment of the Supreme Court, and they will humbly advise His Majesty that this appeal fails and should be dismissed. The costs of the respondent, the Nipissing Central Railway Co., should be paid by the appellant, the Attorney-General for Canada bearing his own costs.

Solicitors for appellant: *Blake & Redden.*

Solicitors for respondent company: *Lawrence Jones & Co.*

Solicitors for respondent Attorney-General: *Charles Russell & Co.*

(1) [1898] A. C. 700, 712.

Applied. HORTON *v.* LONDON GRAVING DOCK CO., LTD. [1950] 1 All E.R. 180.

[PRIVY COUNCIL.]

LETANG . . . . . APPELLANT;

AND

OTTAWA ELECTRIC RAILWAY COMPANY . . . . . RESPONDENTS.

J. C.* 1926 *May* 20.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Negligence—Personal Injuries—Dangerous Premises—Invitee—"Volenti non fit injuria"—Absence of Knowledge of Nature and Extent of Risk.

In Canada, as in England, the maxim "volenti non fit injuria" affords no defence to an action for damages for personal injuries due to the dangerous condition of premises to which the plaintiff has been invited on an errand of business, unless it is found as a fact that he freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, expressly or impliedly agreed to incur it.

Osborne v. *London and North Western Ry. Co.* (1888) 21 Q. B. D. 220 and observations of Bowen L.J. in *Thomas* v. *Quartermaine* (1887) 18 Q. B. D. 685, 696 approved.

Judgment of the Supreme Court of Canada [1924] S. C. R. 470 reversed.

APPEAL by special leave in forma pauperis from a judgment of the Supreme Court of Canada (June 18, 1924), reversing a judgment of the Court of King's Bench for Quebec, Appeal Side (December 28, 1923), which affirmed a judgment of the Superior Court of that Province.

The action was brought by the appellant, in accordance with the law of Quebec, to recover damages from the respondent company for personal injuries sustained by his wife owing to the negligently dangerous condition of a stairway by which she was approaching their railway station for the purpose of travelling.

The facts are fully stated in the judgment of the Judicial Committee.

The defendants by their plea merely traversed the plaintiff's allegations. At the trial the chief defences relied on were: (1.) that the stairway was not part of the respondents' premises, and (2.) that the injuries were not caused by the

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accident. The trial judge rejected both these defences, and gave judgment for $4607.65 damages.

Upon appeal to the Court of King's Bench contributory negligence and the maxim "volenti non fit injuria" were relied on in argument. The appeal was dismissed by a majority of three judges to two.

A further appeal by the present respondents to the Supreme Court of Canada was allowed by a majority (Duff, Anglin, Mignault and Malouin JJ.; Idington J. dissenting). The view of the majority was that the dangerous condition of the stairway was so obvious that notice of the danger was to be imputed to the plaintiff's wife, and that consequently the company owed to her no duty in respect of it; in their view there was an alternative means of approaching the station, which was reasonably safe. The judgment is reported at [1924] S. C. R. 470.

1926. April 26, 27. *Pritt* for the appellant referred to *Indermaur* v. *Dames* (1); *Norman* v. *Great Western Ry. Co.* (2); *Osborne* v. *London and North Western Ry. Co.* (3); and *Thomas* v. *Quartermaine.* (4)

Osler K.C. and *H. C. Walker* for the respondents referred to *Lucy* v. *Bawden* (5) and *Brackley* v. *Midland Ry. Co.* (6)

May 20. The judgment of their Lordships was delivered by

LORD SHAW OF DUNFERMLINE. There has in this case been very considerable difference of opinion among the learned judges in Canada. The judgment in the case was pronounced on April 23, 1923, in the Superior Court by Demers J. after a trial without a jury. It was in favour of the appellant, and awarded to him a sum of $4607. That judgment was appealed to the Court of King's Bench for Quebec, Appeal Side. The Court affirmed Demers J., but Dorion and Howard JJ. dissented. On a further appeal to the Supreme Court of Canada by the respondents these

(1) (1866) L. R. 1 C. P. 274, 288; (1867) L. R. 2 C. P. 311.
(2) [1915] 1 K. B. 584.
(3) 21 Q. B. D. 220.
(4) 18 Q. B. D. 685, 696.
(5) [1914] 2 K. B. 318.
(6) (1916) 85 L. J. (K. B.) 1596.

judgments were reversed and judgment given for the respondents, Idington J. dissenting.

The action is a claim for damages for negligence in respect of an accident to the wife of the appellant, who slipped upon certain steps on the respondents' property. The steps were covered with ice, and she fell heavily and sustained serious injury. It is clear that in such a case great weight must attach to the views and verdict of the judge who tried the case.

The facts as to the place of the accident are, shortly, as follows :—

The line of the defendants' tramway passes over a portion of ground on the south bank, but considerably above the level of the Ottawa River, and known as Rockliffe Park. Gatineau Point is a village on the north side of the Ottawa River, opposite a part of Rockliffe Park where the bank rises steeply to the ground belonging to the defendants. That ground has no boundary fence upon it towards the river. In winter passengers proposing to travel by the tramway cross the river on the ice. In summer they are landed at a wharf at the bottom of the slope ex adverso of the tramway property. From that they climb up to the edge of the property. There are at several points courses of steps, with regard to which no responsibility attaches to the defendants. At the edge of the tramway property, however, a course of steps had been placed ; two or three of these at the top were actually upon tramway ground, and from that point to the tramway line and platform was a distance of eighty feet in a straight line over ground which sloped slightly up to the rail level. Manifestly for the convenience of tramway passengers, the company had built a series of concrete steps, so that passengers coming up the steps from the river crossed straight to the tramway line, but for a portion of the way had the benefit of this flight. These simple facts seem, on the mere statement of them, to constitute something very like an unmistakable invitation by the respondents to passengers from Gatineau to come up to their tramways by the route thus formed.

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The public so interpreted the position. The facts as to the actual use made of this convenient access are strong. It was habitually used, not by one or two passengers, as if by way of adventure, but by between 700 and 800 tramway passengers per day. It was, in short, their ordinary access to the tramway line, and this use must, of course, have been known to the defendants and their representatives. In the opinion of the Board the appellant's wife, who was one of these passengers, must be regarded as an invitee, and the law applicable to the case is the law of responsibility in an invitee's case.

In the arguments before the Board it was not denied that, upon the day of the accident, the steps of the tramway property were in a bad condition and dangerous through the gathering of water, which in the occasional thaw flowed down the slope of the tramway property on to the steps and was there congealed by frost. No prohibition or warning against use was made, nor were any of the things done which were mentioned in the evidence as reasonable to be done in order to avert the danger—namely, chopping the ice, clearing it away, or spreading sand or cinders upon the steps. For the convenience of persons using the stair there was a handrail. The woman kept hold of this, but slipped so suddenly that she had no power to maintain her weight, and she fell and was injured.

The case is accordingly that of an invitee who comes on to property of the defendant owner and on an errand of business as his customer. The familiar rule as to an invitee is expressed by Willes J. in *Indermaur* v. *Dames* (1): "We consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact."

(1) L. R. 1 C. P. 274, 288.

The defendants' case pleaded at their Lordships' Bar was not that their property had been kept reasonably safe for such an invitee. On the contrary and throughout the case they maintained that they had exercised no care of the steps at all, as they had no duty with regard to them. They however maintained that the woman had been guilty of contributory negligence, and it was specially urged that the maxim "volenti non fit injuria" applied to prevent her from recovering compensation.

The defendants urged in the first place that, if the woman had avoided the steps, although these were hourly and generally used as already mentioned, and had gone round some considerable way upon a made road, which was in a safe condition for foot passengers, the accident would have been avoided. It seems at least doubtful whether this, in the circumstances, would have disentitled her to the legal rights of an invitee, but on this point it is unnecessary for their Lordships to pronounce; for they are of opinion that it is not proved that this roundabout road would have been at all safer. The evidence inclines one to the belief that, constructed as it was upon a longer winding slope, its condition at that season of the year—namely, in February, was possibly not less hazardous, if not more so, than the direct and accustomed route taken. The defence, however, above stated remains quite apart from that point.

It is quite a remarkable circumstance that there is no trace of the defence of contributory negligence or volenti non fit injuria upon the respondents' pleadings. As, however, these subjects seem to have been fully argued in the Courts below their Lordships will accordingly deal with them.

The onus of establishing the plea of contributory negligence rests upon the defendants. In their Lordships' opinion this was a fair and most relevant subject for thorough and searching cross-examination of the appellant's wife, whose negligence the defendant company was alleging and endeavouring to prove. It is sufficient to say that the defendant company made no effort in this direction. The woman entered and left the witness box without a question on the

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subject being put to her. It would rather appear that, at that stage of the case, the real contest between the parties was as to the actual situation of the steps, whether they were or were not on the defendants' property, and whether the defendants had any duty to keep these steps in a passable condition. Whatever the reason, the only actor who could have spoken of contributory negligence—namely, the appellant's wife—had not the subject of her alleged blame put to her. The Board thinks that the learned trial judge very rightly held that contributory negligence had not been established.

The truth is that this case has been, in its later stages, argued, as it was ably argued before the Board, as one in which the maxim "volenti non fit injuria" applied. In the view taken by the Board that maxim and the doctrine underlying it have not been correctly apprehended by some of the learned judges in the Court below. This kind of problem is frequently before the Courts. It is quite a mistake to treat volenti non fit injuria as if it were the legal equipollent of scienti non fit injuria. As Bowen L.J. expressed it in *Thomas* v. *Quartermaine* (1): "The maxim, be it observed, is not '*scienti*' *non fit injuria*, but '*volenti*.' It is plain that mere knowledge may not be a conclusive defence. . . . . The defendant in such circumstances does not discharge his legal obligation by merely affecting the plaintiff with knowledge of a danger. . . . . Knowledge is not a conclusive defence in itself. But when it is a knowledge under circumstances that leave no inference open but one, namely, that the risk has been voluntarily encountered, the defence seems to me complete."

A case very near the present on its facts is that of *Osborne* v. *London and North Western Ry. Co.* (2), in which *Thomas* v. *Quartermaine* (3) was carefully founded on. The plaintiff was injured by falling on steps leading to the defendants' railway station. These steps the defendants had allowed to be slippery and dangerous. There was no contributory negligence on the part of the plaintiff, but there were other

(1) 18 Q. B. D. 685, 696, 697. (2) 21 Q. B. D. 220, 224.
(3) 18 Q. B. D. 685, 696.

steps which he might have used (a direct analogy in fact with the present case), and he admitted that he knew the steps were dangerous, and went down carefully holding the rail. The railway company was held responsible. Wills J. puts the matter thus: "I should have thought it necessary that the plaintiff should be asked more questions than he was asked in cross-examination. It is clear from his evidence that he knew there was some danger, but the contention on behalf of the defendants, that this circumstance is sufficient to entitle them to succeed, entirely gives the go-by to the observations of Lord Esher M.R. in *Yarmouth* v. *France*. (1) . . . . In the present case the plaintiff may well have misapprehended the extent of the difficulty and danger which he would encounter in descending the steps; for instance, he might easily be deceived as to the condition of the snow; I know quite enough about ice and snow to know how easy it is to make such a mistake, and it is one that has cost many a man his life. In order to succeed the defendants should have gone further in cross-examination, for, unless the question of fact had been found in their favour, the application of the maxim on which they relied could not be established. The county court judge has not found the fact the defendants need; and upon the present materials I certainly am not prepared to supply the deficiency."

The law of Canada and England seems to be summed up in the leading proposition to Wills J.'s judgment (2): "If the defendants desire to succeed on the ground that the maxim volenti non fit injuria is applicable, they must obtain a finding of fact that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it."

To apply these illustrations to the present case, there is no evidence whatsoever that the appellant's wife, holding on as best she could to the handrail, had full knowledge of the nature and extent of the danger; or that, knowing this, she freely and voluntarily, with full knowledge of the nature and extent of the risk she ran, encountered the danger. As to

(1) (1887) 19 Q. B. D. 647, 657. (2) 21 Q. B. D. 220, 223, 224.

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this, it is to be noted that she was merely traversing the same steps and under the very same circumstances as many hundreds of tramway passengers. Probably the legal situation is answered by the observation already made, that neither the woman's knowledge nor will was made the subject of cross-examination at all. It rather appears that the judgments, in so far as sustaining this defence, are based solely upon the fact that there was some danger from slipperiness apparent to anybody on the steps. Unless, however, the defendant company, who had invited the woman to use that access and were accordingly bound to keep it reasonably safe, could establish that she fully knew and understood the nature and the extent of the danger and resolved voluntarily to undertake the risk, the defence fails. All that the defence put to the woman was whether she held on to the rail and should not have saved her fall in that way. They elicited the answer "Je le tenais, comme il faut," and there the defence founded on the maxim "volenti non fit injuria" came to an end.

Their Lordships will humbly advise His Majesty that the appeal should be allowed and the judgment of the Court of King's Bench and the judgment of the Superior Court restored. The respondents will pay the costs in the Courts below and such costs of this appeal as the appellant, suing as a pauper, is entitled to.

Solicitors for appellant: *Lawrence Jones & Co.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

BANK OF N. T. BUTTERFIELD AND SON, LIMITED . . . . . } APPELLANTS;

AND

GOLINSKY . . . . . RESPONDENT.

J. C.* 1926 June 7.

ON APPEAL FROM THE SUPREME COURT OF BERMUDA.

Assignment—Shares in Banking Company—Equitable Assignment—By-laws of Bank—Liability of Shareholder to Bank—Priority.

By-laws of the appellant Bank, made under its Act of incorporation, provided: (44.) "the directors may decline to register any transfer of a share made by a shareholder who is indebted to the Bank"; (57.) "the directors may deduct from the dividends payable to any shareholder all sums of money due by him to the Bank on account of calls or otherwise." In November, 1924, the registered holder of two shares assigned them in writing to the respondent as security for money due; he executed no transfer but deposited the share certificate with the respondent. In May, 1925, the Bank, which had no notice of the assignment, obtained judgment against the shareholder for money due from him, and seized the shares in execution. There was no evidence that the shareholder's liability to the Bank existed at the date of the assignment. The respondent claimed priority to the Bank:—

Held, that the by-laws gave the Bank no lien on the shares for the debt to them, and that the respondent was entitled under the assignment to a charge in priority to the Bank's rights under the execution.

Judgment of the Supreme Court of Bermuda affirmed.

APPEAL (No. 27 of 1926) from a judgment of the Supreme Court of Bermuda (December 18, 1925).

The judgment appealed from was delivered in an interpleader action in the Supreme Court in respect of two fully paid shares of 50*l.* each in the appellant Bank registered in the name of one Moniz. The respondent was made plaintiff in the proceedings, and the appellant Bank, also one Foote (not a party to the present appeal), defendants.

The respondent claimed a charge upon the shares under an assignment in writing from Moniz dated November 28, 1924, accompanied by a deposit of the share certificate, as security for a debt of 350*l.* and interest.

The appellant Bank had obtained a judgment against

* *Present:* VISCOUNT HALDANE, LORD ATKINSON, and LORD DARLING.

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Moniz on May 25, 1925, for 1010*l.*, money due from him and costs, and had levied execution on the shares. It did not appear at what date the debt arose.

Foote had obtained a judgment for 374*l.* on December 10, 1924, and had levied execution, but not upon the shares.

The material terms of the Act of incorporation of the Bank, and of by-laws made thereunder, together with the relevant facts, appear from the judgment of the Judicial Committee.

The Supreme Court, by a judgment delivered by Beatty C.J., held that the present respondent was entitled to priority under the equitable assignment to him.

1926. June 4, 7. *Clayton K.C.* and *W. M. Hunt* for the appellants. Under by-laws 41 and 57 of the Bank the appellants had a lien upon the shares and the dividends thereon for all indebtedness by Moniz to the Bank incurred before notice of the equitable assignment: *Bradford Banking Co.* v. *Briggs* (1); Buckley on Companies, 10th ed., p. 587, § 4. They had no notice until after execution had been levied. The by-laws were to the same effect as the articles of association in question in the case cited above, and, by giving to the directors the right to refuse registration, in effect gave them a lien on the shares for indebtedness. The lien was not confined to liability for calls upon the shares: *Ex parte Stringer.* (2) The cases relied on by the Court in Bermuda—namely, *Hubbersty* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (3) and *In re Cawley & Co.* (4)—do not apply to the facts of this case. [Reference was made also to *Hopkinson* v. *Rolt.* (5)]

The respondents did not appear.

June 7. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Bermuda. There were two fully paid shares in the appellant Bank, registered in the name of

(1) (1886) 12 App. Cas. 29.
(2) (1882) 9 Q. B. D. 436.
(3) (1867) L. R. 2 Q. B. 471.
(4) (1889) 42 Ch. D. 209.
(5) (1861) 9 H. L. C. 514.

one Moniz. The shares had been seized under writs of execution against Moniz, and they were claimed by the respondent and by one Foote, and also by the Bank, so far as its lien for alleged indebtedness was concerned.

A summons was taken out under which an order was made that the title to the shares should be determined by the Court, the respondent to be the plaintiff as regards his claim and the appellant Bank and Foote the defendants. The purpose of the summons was to decide, under the circumstances to be referred to, which of these three parties had the better title to the shares. The decision of the Court below has been that the respondent, Golinsky, has the better title.

Golinsky's title arose in this way: he was an equitable assignee of the two shares from Moniz as security for 350*l.* and interest; what he claimed was that his title to the 350*l.* and interest came first. The assignment was made on November 28, 1924, from Moniz to Golinsky. It was not registered in the appellant Bank register, but it was a good assignment in equity.

Then later on there were judgments against Moniz and there were various proceedings, not material to discuss, and finally, on May 29, 1925, the appellant Bank obtained judgment in an action against Moniz for a sum of over 1000*l.*, and a writ of fi. fa. was issued against his chattels. Under that writ the Provost Marshal General of the Court seized the two shares which are the subject of these proceedings.

There is no evidence at all to show whether, at the time of the assignment of November 28, 1924, Moniz, the holder of the two shares, was indebted to the appellant Bank, and therefore their Lordships have to take it that they are dealing with this case on the footing that the title set up by the Bank is a title based upon their rights under their statute and by-laws, in respect of liabilities that have subsequently emerged.

Turning to these, they are said to show that, at any rate subsequently to the assignment to the respondent, the Bank became creditors of Moniz and recovered judgment, and have a lien or right to payment out of the two shares, which is paramount to anybody else's title. The respondent,

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Golinsky, has not been registered and his title is not one of which they are bound to take notice further than this, that a Court of equity would enforce it as amounting to a good right to a transfer if the equity existed in Golinsky.

Turning now in the first place to the statute of the Bank (Act 11 of 1904) under which the Bank was incorporated, the relevant section is s. 22, which provides that in the event of a seizure of the shares of the shareholder under an execution the shares and all dividends due on them are only to be available for so much as remains " beyond the amount of the then existing liabilities of the Bank, direct and collateral, whether payable at the time of such notice "—i.e., of the execution—" or at any future time." That is a kind of provision which was not unfamiliar in the old classes of banks, but it is sufficient to say that we have nothing to do with it here, because there is no evidence of any liability of the Bank which could be available to bind the shares.

Then turning to the by-laws the only two of importance are first, 44, which says : " The directors may decline to register any transfer of a share made by a shareholder who is indebted to the Bank "—no question arises as to that—then 57, which says : " The directors may deduct from the dividends payable to any shareholder all sums of money due by him to the Bank on account of calls or otherwise." There is no question of deduction from dividends here ; therefore that article does not apply.

Their Lordships are therefore thrown back upon the general law, and the general law is this : that where there has been a transfer in equity, even although there has been no registration of the legal title, then, as shown, for example, in the judgment of the House of Lords in the case of the *Bradford Banking Co.* v. *Briggs* (1), the equitable assignee is entitled to say : I have got an equitable property which you cannot cut down by making any advance to or purchase from my assignor. I am, in equity, the person entitled, and unless you can set up a legal estate against me without notice you cannot defeat that equitable title.

(1) 12 App. Cas. 29.

On that principle the learned judges in the Court below came to the conclusion that Golinsky, the respondent, had got a good equitable title to these shares which could not be defeated by anything done until he was restricted in it by notice of somebody else's title subsequently obtained. After he had notice it would not have been open to him to expand his security or acquire further equitable title in derogation of the title of which he had notice, but until that happened he remained secure in possession of what he had already got.

On that principle the learned judges in the Court below determined this appeal, and their Lordships think that they so decided rightly, and they will therefore humbly advise His Majesty that this appeal be dismissed.

Solicitors for appellants : *Sewell, Edwards & Nevill.*

[PRIVY COUNCIL.]

AUSTRALIAN BANK OF COMMERCE, LIMITED . . . . . } APPELLANTS ;

AND

PEREL AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales—Bank—Issue of Bank Cheques—Authority of Manager of Customer's Business—Ostensible Authority.

The respondents had two accounts with the appellant bank at Sydney in connection with a business which they there carried on. They informed the bank in writing that the two managers of their business had authority together to sign and indorse cheques, to draw and indorse promissory notes and bills of exchange, and to transact on their behalf all business connected with the accounts. Banks in Australia frequently issue to a customer, in exchange for a cheque in favour of the bank, a cheque (described as a "bank cheque") drawn by the bank on itself in favour of a person designated by him, or to bearer. In exchange for cheques drawn in favour of the appellant bank by the managers,

* *Present :* VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW, and LORD PARMOOR.

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the bank issued to one of the managers bank cheques payable to a name designated by him; these cheques he fraudulently appropriated:—

Held, that the appellant bank was not entitled to debit the bank cheques against the respondents. The manager had not implied authority to receive bank cheques; and the circumstances in which on certain previous occasions the manager had been allowed to give instructions as to the application of the amount of cheques drawn, made the evidence fall far short of the strong case needed to show an ostensible authority prevailing over written instructions.

Judgment of the Supreme Court affirmed.

APPEAL (No. 15 of 1925) from a judgment of the Supreme Court of New South Wales in equity, dated November 26, 1923.

The action was brought by the respondents against the appellants. In form it was a suit to redeem securities pledged by the respondents with the bank, but the only question in issue was whether the bank was entitled to debit against the respondents the sum of 21,268*l.* 10*s.* or any part of it. That sum was the amount of twenty-two cheques drawn by the respondents on, and in favour of the bank; in exchange for the cheques the bank had handed to McClintock, one of the respondents' managers, cheques (described as "bank cheques") drawn by the bank in favour of persons designated by McClintock. The bank cheques had been fraudulently misappropriated by McClintock. The respondents alleged that they were issued without authority and contrary to instructions given to the bank.

The facts are stated in the judgment of the Judicial Committee.

An appeal to the Privy Council in a previous action brought by the respondents in consequence of the frauds is reported at [1922] 1 A. C. 240.

The Chief Judge in equity, Street J., gave the respondents the relief which they claimed and dismissed a counterclaim by the present appellants.

1926. April 29, 30; May 3, 4, 10. *Maugham K.C.* and *T. Mathew* for the appellants contended that McClintock had implied authority from the appellants to obtain the bank cheques, or that he was held out as having that authority;

on the latter contention they referred to the cases mentioned in the judgment.

Sir John Simon K.C. and *Wilfred Barton* for the respondents referred to *Russo-Chinese Bank* v. *Li Yau Sam* (1); *Kepitigalla Rubber Estates* v. *National Bank of India* (2); *Morison* v. *London County and Westminster Bank.* (3)

June 8. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. This is an appeal by the Australian Bank of Commerce, Ld. (which may be shortly referred to as "the bank"), against a decree of the Supreme Court of New South Wales in equity, made in an action brought against the bank by the trustees of the estate of the late John Norton for the redemption of property forming part of that estate and mortgaged to the bank. The question in dispute in that action was as to the right of the bank to charge the trustees in account with twenty-two sums debited to them by the bank between February 28, 1918, and July 21, 1919, and amounting in all to 21,268*l.* 10*s.* The action was heard by Street J., Chief Judge in equity, who gave judgment for the trustees on that issue, holding that the bank had no right to charge the trustees with those sums; it is against that decision that the present appeal is brought.

Mr. John Norton died in the year 1916, possessed of a valuable newspaper publishing business, which was carried on at Sydney and elsewhere in Australia and also in New Zealand. After his death the business was carried on by his trustees, their manager and secretary being one Harold James McClintock. In the year 1917 the trustees transferred their banking account to the appellant bank, and by a letter dated April 2, 1917, informed the bank that they had authorized Messrs. H. J. McClintock and Leonard Connolly jointly to operate on the accounts (known as No. 1 Account and No. 2 Account) which they had opened with the bank.

The letter then proceeded as follows: ". . . . and you will please pay and charge to such accounts all cheques, promissory

(1) [1910] A. C. 174. (2) [1909] 2 K. B. 1010.
(3) [1914] 3 K. B. 356.

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notes, bills of exchange, orders and other documents of whatever nature, signed accepted or endorsed by them, or which they may authorize you to pay or debit to either of the said accounts, whether the accounts be in credit or debit or be converted from a credit to an overdrawn account by any such cheque or other documents.

"We have also empowered them: To endorse cheques. To make, accept, draw and endorse bills of exchange or promissory notes. To negotiate other instruments. To give and deposit with you securities against all advances that may be made on the account. To withdraw securities and deeds and give receipts therefor. Generally to transact on behalf of the trustees of the estate of the late John Norton all business connected with the said accounts or either of them.

"In the event of the absence through illness or otherwise of either Mr. McClintock or Mr. Connolly, we have authorized Mr. Robert James Marsh to countersign cheques with Mr. McClintock or with Mr. Connolly.

"All cheques and other documents drawn on or in connection with either of the said accounts will be signed as at foot hereof."

The signatures at the foot of the document included those of H. J. McClintock, L. Connolly and R. J. Marsh. On August 27, 1917, these instructions were modified by the addition of a requirement that all cheques drawn on the above mentioned accounts must be countersigned by Messrs. Starkey & Starkey, the accountants of the trustees; but except in that respect the instructions remained unaltered throughout the period in question in these proceedings.

In the month of February, 1918, H. J. McClintock began to practise on his employers the series of frauds which ultimately led to these proceedings. It appears that the appellant bank, in common with other banks in Australia, is in the habit of issuing to any customer who desires it, in exchange for a cheque drawn on that customer's account in favour of the bank, a cheque drawn by the bank on itself in favour of a person designated by the customer or order or bearer. A bank cheque so issued by a responsible bank

is treated as equivalent to cash, and is used by the customer for any purpose for which cash or its equivalent is required, such as completing a purchase, paying taxes, etc. McClintock, taking advantage of the practice above described, procured cheques to be drawn on the trustees' No. 2 account in favour of the appellant bank and to be duly signed by himself and Mr. Connolly or Mr. Marsh and countersigned by the accountants, and took the cheques so signed to the bank, and obtained from the bank in exchange for these cheques bank cheques for equivalent amounts in favour of payees designated by himself alone. Of these bank cheques, the first as to which a question arises—namely, a cheque dated February 26, 1918—was drawn in favour of one George Tallis (with whom the trustees had business relations) or order; and McClintock having forged the indorsement of Tallis on this cheque, paid it into an account which he had opened at the Union Bank of Australia in the assumed name of "Robert Haynes." The remaining bank cheques in question, which were twenty-one in number and ranged in date from May 3, 1918, to July 21, 1919, were drawn in favour either of "Robert Haynes" or of some other payee "or bearer"; and all these cheques were taken by McClintock and either paid into his account in the name of Robert Haynes or otherwise used for his own purposes. In the latter part of July, 1919, the suspicions of the trustees were aroused and the frauds were brought to light, and McClintock was sentenced to a term of imprisonment. The bank cheques so obtained and misappropriated by McClintock amounted together to the above mentioned sum of 21,268*l.* 10*s.*, and it is this amount which the appellant bank seeks to debit to the trustees. This debit has been disallowed by the learned Chief Judge, and the question to be determined is whether it was rightly so disallowed.

That McClintock had no express authority to obtain from the bank the bank cheques which are in dispute is clear. The bank had received from the trustees definite written instructions that all cheques on the trustees' two accounts were to be signed by two of the three persons named in the

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instructions (McClintock, Connolly and Marsh) and countersigned by the accountants, Starkey & Starkey, and that these persons alone were authorized jointly to transact on behalf of the trustees all business connected with the accounts or either of them; and it was a clear breach of these instructions to hand to McClintock on his sole request bank cheques with which he could deal as he thought fit.

Nor can it be maintained that McClintock as manager had implied authority to specify the services which the bank was to render in return for the cheques properly drawn in their favour, and in so doing to request them to issue the bank cheques in question. As Lord Sumner said in the judgment rendered by him in a previous appeal connected with these transactions: *Union Bank of Australia* v. *McClintock* (1), "a manager manages, but how and under what restrictions must be proved"; and it is hardly arguable that McClintock, merely because he was the manager, had an implied authority which would have the effect of completely neutralizing and defeating the express instructions given to the bank. Some evidence was called with a view to proving that it is the practice of Australian banks to issue bank cheques on the request of any "responsible representative" of a customer, and it may be that some banks take that risk; but if such a course is followed in face of definite instructions such as those which were given in the present case, the bank following that course is acting without authority.

But it was argued—and it was on this contention that the case for the appellants was mainly rested—that on the facts of this case McClintock had at least ostensible authority to require the issue of the bank cheques—or in other words, that the trustees were estopped by their own conduct from denying that authority. In support of this argument, counsel for the appellants relied on the fact that on a number of occasions, beginning in the year 1917, and continuing until July, 1919, McClintock had brought to the bank cheques duly signed in favour of the bank and had given directions as to the application of the amount. Twenty-seven such

(1) [1922] 1 A. C. 240, 244.

instances, in addition to those which are in dispute in this action, were cited, and it was argued that this evidence showed a "course of business" sufficient to justify the bank in acting on McClintock's directions and to prevent the trustees from disputing his authority. That such a result might possibly follow if the evidence were sufficient to support it may be inferred from such cases as *International Sponge Importers* v. *Andrew Watt & Sons* (1); *Meyer & Co.* v. *Sze Hai Tong Banking and Insurance Co.* (2); and *Morison* v. *London County and Westminster Bank.* (3) But it is evident that, in order that a course of business such as is alleged may prevail over express written instructions, a strong case must be made; and when the evidence in the present case is examined, it is found to fall far short of what is required. Of the twenty-seven instances on which the appellants rely, twenty-one resulted only in the transfer of funds from one of the trustees' accounts to some other account of the trustees, or from their bank at Sydney to their bank in Melbourne or elsewhere; and it is obvious that no sound argument can be founded on these instances in which the sums in question did not pass out of the control of the trustees. In the remaining six cases bank cheques were issued, but Sir John Simon's analysis of the facts in these cases showed clearly that no inference as to a course of business could properly be based upon them. One of these six bank cheques, a cheque for 8213*l.* 18*s.* 11*d.*, was transmitted by the appellants themselves, by direction of the trustees, to the Commercial Bank for the purpose of paying off an overdraft at that bank. A second cheque, a cheque for 6898*l.* 4*s.* 6*d.*, was dealt with, not on McClintock's sole instructions, but on instructions signed, as the trustees' accountant swore, by the three persons who signed the original cheque to the bank. Of the other four bank cheques two were given in exchange for cheques to bearer; one was given not to McClintock, but to another clerk of the trustees, who applied it in redeeming a security; and one only (a cheque for 128*l.* 11*s.* 4*d.*) was dealt with on

(1) [1911] A. C. 279. (2) [1913] A. C. 847.
(3) [1914] 3 K. B. 356.

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the instructions of McClintock alone. Plainly this evidence, when properly understood, is of no value whatever for the purpose of proving an ostensible authority in McClintock to call for the issue of such bank cheques as he might require. This argument, therefore, breaks down on the facts.

There remains the earliest of the bank cheques in dispute—namely, the cheque for 1000*l.* dated February 26, 1918, and payable to "George Tallis or order"—as to which a special case is made. It appears from the counterfoil of the original cheque for 1000*l.* drawn by the three signatories in favour of the bank, which was dated February 13, 1918, that the proceeds of the cheque were intended to be used for the purpose of paying an instalment of purchase money due to Tallis; and it is suggested that in these circumstances McClintock had authority to obtain in return for the cheque a bank cheque for the same amount in favour of Tallis "or order," and that for his subsequent forgery of the indorsement the bank is not responsible. But the answer is that the bank never saw the counterfoil, and that they had no proper authority either to draw the bank cheque in favour of Tallis or to put it in McClintock's hands, but should have obtained the authority of the signatories for the disposal of the amount. The appellants also rely on evidence which appears to show that on some subsequent date, probably when discovery was imminent, McClintock, out of moneys at his own disposal, paid to Tallis the 1000*l.* due to him, so that the trustees were relieved of this liability. But there was no evidence to show that this payment was made out of the proceeds of the bank cheque for 1000*l.*, and it seems more probable that it was made (as the learned Chief Judge suggested) out of the proceeds of further thefts from the trustees. The payment of Tallis did not reduce the liability of McClintock to the trustees below the sum in issue in these proceedings. This sum has therefore been rightly disallowed.

There remains one further argument to be considered. It appears that in the month of September, 1919, shortly after the discovery of the frauds, the trustees suggested to the appellants that the former should make a claim against the

Union Bank (where McClintock's "R. Haynes" account had been kept) for conversion of the bank cheques in question, and that it should be agreed that the making of such a claim by the trustees should be without prejudice to the trustees' claim against the appellant bank. The appellants assented, and thereupon the trustees brought an action against the Union Bank for conversion, alleging in the action (as was necessary) that McClintock had the authority of the trustees to obtain the bank cheques from the appellant bank, or that they had ratified his acts. No evidence of any specific authority or ratification was given, and the contention was one of law, founded on the facts as proved in these proceedings. The action failed, and an appeal to this Board resulted in the confirmation of the jury's verdict. The present appellants now contend that the trustees, in pleading or contending in the proceedings against the Union Bank that McClintock had acted with authority in drawing the bank cheques, or (in the alternative) that they had ratified his proceedings, must be held to have adopted his actions, and could not now repudiate them. In their Lordships' opinion the appellants are not entitled to put forward this contention. In concurring in the proceedings against the Union Bank, which were obviously taken with a view to the common advantage of the present appellants and respondents, the appellants formally agreed that those proceedings should be without prejudice to the trustees' claim against them; and although the claim for redemption put forward in this action had not then been brought, their Lordships are of opinion that it is protected by the agreement.

For these reasons their Lordships are of opinion that the decision of the Court in New South Wales should be affirmed, and they will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors for appellants: *Burton, Yeates & Hart.*
Solicitors for respondents: *Dawes & Sons.*

[PRIVY COUNCIL.]

J. C.* 1926 June 18.

MARTINS . . . . . Appellant;

AND

FOWLER . . . . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF NIGERIA.

Nigeria (Southern)—Intestate Succession to real Estate—Construction of Ordinance—"Marriage validated hereby"—Marriage valid apart from Ordinance—Headings to Sections—Marriage Ordinance, 1884 (*Laws of Southern Nigeria, cap. XCV.*), *ss.* 38, 39.

The Marriage Ordinance, 1884, of Southern Nigeria, provided by s. 38 that every marriage already duly celebrated in the Colony by any minister of any religious denomination was to be deemed to have been a valid marriage, and by s. 39 that where any person who before the Ordinance had contracted a marriage "validated hereby," or the issue of such marriage, died intestate after the Ordinance, both the real and personal estate of the intestate were to be distributed according to the law of England as to the distribution of the personal estate of intestates. The heading to s. 38 was "Marriages already celebrated," that to s. 39 "Succession to Intestates' Property":—

Held, that s. 39 did not apply in the case of a marriage which was valid apart from s. 38 as well as under it, the words "validated hereby" being less wide than "declared hereby to be valid"; that construction was supported by a consideration of the headings to the sections, which might be regarded as preambles to the provisions following them.

Judgment of the Supreme Court of Nigeria affirmed.

Appeal (No. 82 of 1925) from a judgment of the Supreme Court of Nigeria (January 24, 1924) reversing a judgment of a judge of that Court.

The action was brought in the Supreme Court by the present respondent to recover from the appellant, executor of the will of Rebecca Smith, a freehold plot of land in Lagos.

The question for decision turned upon the construction of ss. 38 and 39 of the Marriage Ordinance, 1884 (cap. XCV. of the Laws of Southern Nigeria).

The facts, which were not in dispute, and the material terms of the sections appear from the judgment of the Judicial Committee.

The trial judge (Pennington J.), applying s. 39 to the case,

* *Present:* Viscount Haldane, Lord Atkinson, and Lord Darling.

dismissed the action; on appeal the decision was reversed, and judgment entered for the plaintiff. The view of the Appellate Court appears from the present judgment.

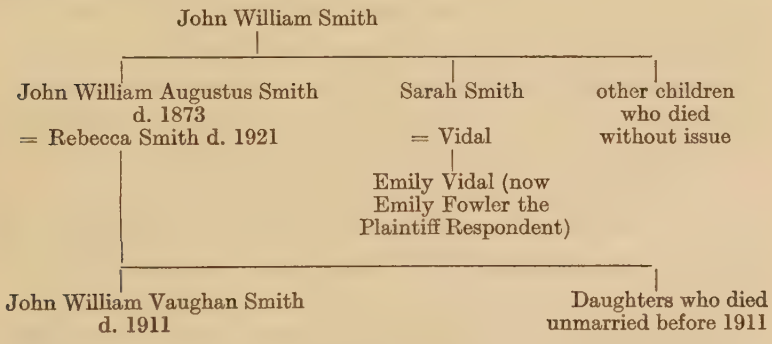
1926. June 4. *Giveen* for the appellant.
Horace Douglas for the respondent.

June 18. The judgment of their Lordships was delivered by

LORD DARLING. This is an appeal from a judgment of the Supreme Court of Nigeria dated January 25, 1924, reversing the judgment of the Court below dated March 19, 1923. In the proceedings the present appellant was defendant and the present respondent was plaintiff.

The question for decision turns upon the construction of certain sections of the Marriage Ordinance, 1884 (cap. XCV. of the Laws of Southern Nigeria).

The dispute between the parties is as to the true ownership of certain property known as "Smith's Compound" situate in Faji Market, Lagos, Nigeria. A family tree of the Smith family is here set out with a view to elucidating the facts and relationships hereinafter mentioned.



The property was originally purchased by John William Augustus Smith (hereinafter called "Augustus Smith") at some time prior to his death in 1873. The exact date of purchase does not appear nor is it material to the present question. Augustus Smith died in 1873 intestate, leaving a widow Rebecca Smith and issue him surviving. At such time the law as to the devolution of real property in Lagos

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was similar to the law in force in England, and accordingly the property passed to his son John William Vaughan Smith. Vaughan Smith died in 1911 intestate and without issue. The other issue of Augustus Smith predeceased Vaughan Smith leaving no issue them surviving. Rebecca Smith died in the year 1921, having by her will devised the said property. The present appellant is the executor of the will of Rebecca Smith. The present respondent, the plaintiff in the proceedings below, is the daughter of Sarah Smith the sister of Augustus Smith, and is therefore a cousin of Vaughan Smith.

The respondent by her writ and statement of claim claimed possession of the said premises. The appellant by his defence in effect pleaded that he was in possession of the premises. The substantial dispute between the appellant and the respondent is as to the devolution of the property upon the death of Vaughan Smith.

The appellant contended that the property devolved according to the rules as to devolution of personal estate, and accordingly became vested in Rebecca Smith, mother of Vaughan Smith. The respondent contended that the property devolved according to the rules as to devolution of real property, and accordingly vested in the respondent Emily Fowler, the cousin of Vaughan Smith.

The determination of this question depends upon the construction of ss. 38 and 39 of the Marriage Ordinance, 1884.

The sections, so far as material, are as follows :—

" 38. Every marriage celebrated in the Colony before the commencement of this Ordinance by any minister of any religious denomination or body, according to the rites in use by such religious denomination or body shall be, and shall be deemed to have been from the time of the celebration thereof a legal and valid marriage ; " . . . .

" 39. Where any person who is subject to native law or custom contracts a marriage in accordance with the provisions of this or any other Ordinance relating to marriage, or has contracted a marriage prior to the passing of this Ordinance which marriage is validated hereby and such person dies intestate, subsequently to the commencement of this

Ordinance, leaving a widow or husband or any issue of such marriage, and also where any person who is issue of any such marriage as aforesaid dies intestate subsequently to the commencement of this Ordinance, the personal property of such intestate and also any real property of which the said intestate might have disposed by will shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates, any native law or custom to the contrary notwithstanding." . . . .

Augustus Smith had been married before the commencement of the Ordinance, and Vaughan Smith was issue of that marriage. It was admitted that it was a valid marriage apart from the provisions of the Ordinance.

The action came on for hearing on March 5 and 13, 1923, before Pennington J., and on March 19 the learned judge gave a considered judgment, in which he found in favour of the defendant. In effect the learned judge held that the marriage of Augustus Smith was a marriage which had been validated by the Ordinance, and that consequently the property must devolve as personal property in accordance with the provisions of the Ordinance.

Against this decision the plaintiff appealed. The appeal came on for hearing on January 15, 1924, before Combe C.J. and Van der Meulen and Tew JJ. The Court reserved judgment.

On January 25, 1924, the Chief Justice delivered judgment, in which the rest of the Court concurred, allowing the appeal of the plaintiff and directing that judgment be entered for the plaintiff for possession of the premises, with costs. Shortly stated the opinion of the Court was that although s. 38 of the Ordinance applied to all marriages before the commencement of the Ordinance, whether otherwise valid or not, s. 39 did not include marriages which were valid before the commencement of the Ordinance.

From this decision the present appeal is brought. Final leave to appeal was granted on May 2, 1924.

In giving the judgment from which this appeal is brought

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the learned Chief Justice thus expressed his decision upon the point in issue: "Section 38 applied to both the valid and invalid marriages and declared that all were valid, but in fact only those which were invalid were validated by the Ordinance. Section 39 applies only to marriages under the Ordinance and marriages 'validated' by the Ordinance. There is in my opinion a distinction between the term 'marriages validated by the Ordinance' and 'marriages declared to be valid by the Ordinance.' The latter is the wider term and includes all marriages falling within s. 38, both those which were invalid before the Ordinance and those which were valid before the Ordinance. The former term does not include the marriages which were valid before the Ordinance. If it had been the intention of the Legislature to bring within s. 39 all marriages within s. 38 the term 'declared to be valid' and not the term 'validated' would have been used in s. 39."

Since the marriage of John William Smith was—as is admitted—a valid marriage from the moment it was made, there never was any reason why it should be "validated." One does not need to gild refined gold, nor to attempt to perfect a status which is perfect already. Their Lordships are of opinion that the judgment of the Supreme Court of Nigeria is correct for the reasons expressed by that Court.

Moreover, it is to be observed that s. 38 of the Marriage Ordinance is headed "Marriages already celebrated." It deals with marriages described as "valid," and contains no reference whatever to the descent or distribution of property. Now, s. 39—which contains the provision by which certain marriages are "validated"—is headed "Succession to Intestates' Property," and it proceeds to alter the law in regard to succession to the property left by persons whose marriages have been "validated"; making no mention of those whose marriages were already valid, as was always the marriage of John William Smith with Rebecca Smith.

It is clear that such headings as those referred to may be regarded as preambles to the provisions following them. This is so stated in Maxwell on the Interpretation of Statutes,

6th ed., p. 92, and has received judicial authority from Farwell L.J. in *Fletcher* v. *Birkenhead Corporation* (1); also from the Privy Council in *Union Steamship Co. of New Zealand* v. *Melbourne Harbour Trust Commissioners* (2), to mention no others.

In the opinion of their Lordships the decision of the Supreme Court of Nigeria was right, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: *Halligey & Co.*
Solicitor for respondent: *E. F. Hunt.*

[PRIVY COUNCIL.]

BOWLING . . . . . APPELLANT;

AND

COX . . . . . RESPONDENT.

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ON APPEAL FROM THE SUPREME COURT OF BRITISH HONDURAS.

Service out of the Jurisdiction—Money had and received—Implied Contract—Place where Contract impliedly made—Discretion of Court—Consolidated Laws of British Honduras, 1914, *ch. X., s.* 29.

In 1889 P. was adjudicated a bankrupt in England; the appellant was trustee in the bankruptcy. P. afterwards became domiciled in British Honduras, and died there in 1921, possessed of property, but undischarged from the bankruptcy. His will was proved in the Colony by an attorney for the respondent. The appellant claimed against the estate in respect of statutory interest remaining due to creditors in the bankruptcy. With knowledge of that claim, the attorney remitted to the respondent in Chicago a larger sum realized by him from the estate. In 1924, the appellant, having sued the attorney in British Honduras claiming the sum due for interest as money had and received to his use, applied to the Court there for leave to issue a concurrent writ for service on the respondent in Chicago :—

Held, that the cause of action alleged arose out of a contract impliedly made in British Honduras, and that the appellant accordingly was entitled under ch. X., s. 29, of the British Honduras Code of Civil

(1) [1907] 1 K. B. 205, 218. (2) (1884) 9 App. Cas. 365.

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Procedure, to the leave sought; neither the time which had elapsed, nor the fact that the claim was in respect of interest, was a ground upon which the Court should have exercised its discretion to refuse leave.
Judgment of the Supreme Court of British Honduras reversed.

APPEAL (No. 86 of 1925) from an order of the Supreme Court of British Honduras (December 30, 1924).

The appeal arose out of an application to the Supreme Court by the appellant, trustee in the bankruptcy of one Plummer, for leave to issue a concurrent writ, claiming certain money as had and received to his use, for service on the respondent in Chicago, U.S.A.

The Chief Justice, having granted ex parte the leave sought, set aside his order upon an application by the respondent.

The material facts of the case, and the terms of the relevant rule of practice in British Honduras, appear from the judgment of the Judicial Committee.

1925. June 3. *Doughty K.C.* and *A. de Reya* for the appellant.

Merriman K.C. and *Roger Bacon* for the respondent.

June 21. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a decision of the Supreme Court of British Honduras setting aside an order which gave leave to the appellant, as trustee in bankruptcy of one Plummer, who had been made bankrupt in England where he was then domiciled, to serve notice of a writ obtained in British Honduras on the respondent, who was outside the jurisdiction of the Courts of the Colony, and was resident at Chicago, in the United States of America. Plummer had been adjudicated bankrupt in England in 1889, and had remained an undischarged bankrupt.

Subsequently to his adjudication he had gone to British Honduras and had resided for many years and became domiciled there. Since his death large sums had been paid by the executor to his creditors, but a good deal of money, consisting mainly of accrued interest, was still due to them. Plummer died in 1921, and the respondent is the executor

of his will. Under the will, which was proved in British Honduras by one Young, as attorney for the executor, there has been remitted by Young to the respondent in Chicago large sums of money forming part of the estate of Plummer. The appellant formally made a claim on these sums, and commenced the action out of which this appeal arises in British Honduras against Young to recover the money as money had and received to the appellant's use. He also applied ex parte to the Supreme Court there for leave to issue a concurrent writ for service out of the jurisdiction against the respondent in Chicago.

An order was at first made by the Supreme Court allowing such service, but subsequently, on an application by the respondent to set aside the order giving leave, the Supreme Court made the order under appeal which set the first order aside.

The law relating to the power of the Court to authorize service out of the jurisdiction is contained in s. 29 of ch. X. of the Consolidated Laws of British Honduras, 1914.

That section provides that : " Service out of the jurisdiction of the colony of a writ of summons or notice of a writ of summons may be allowed by the Court whenever the whole or any part of the subject-matter of the action is land or stock, or other property situate within the jurisdiction, or any act, deed, will or thing affecting such land, stock or property, and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate within the jurisdiction."

Plummer had died without having obtained a discharge from his bankruptcy and without having paid his creditors in full. His executor, the respondent, paid over 10,000*l.* to the appellant as the trustee in the bankruptcy, but did not

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pay and refuses to pay the interest due to the creditors, which amounted to over 8000*l*. Young, as the respondent's attorney, has collected assets in British Honduras, which include the amount of this 8000*l*., and has remitted them to the respondent in Chicago. Otherwise the estate appears to have been wound up, so far as the jurisdiction in British Honduras is concerned.

The Chief Justice of the Colony considered, in making the second order, now under appeal, that the case was not one for service out of the jurisdiction. The action, he said, was one of contract, not breach of contract, and he could not see how the implied contract could be held to have been made or entered into within the jurisdiction. The contract, he thought, arose in England on the bankruptcy of Plummer. Apart from this, he regarded the claim as a stale one, and as it was entirely for interest he was not in sympathy with it, and did not think it was one in respect of which he ought to have exercised his discretion to order the case to be tried in the Colony.

It is plain that, so far as these considerations influenced the Chief Justice in exercising his discretion, they were not legitimate. The title to interest was one which it was claimed that the law gave and was not a matter for the exercise of discretion. The estate had been fully administered in the Colony, excepting so far as the payment of the interest due to the appellant was concerned. To that interest the appellant claimed to have a legal right and to have it tried. The surplus of the estate in British Honduras, in the hands of the respondent and his attorney, might well be money had and received to the use of the appellant. If so, this title to it arose when the respondent and his attorney received it, and not in England or at the time of the bankruptcy in 1889. The money was rather money had and received, in which case the title to it arose, when it was got in by the executor, under an implied contract which the law imputes, and which renders him liable to proceedings in the nature of an assumpsit at common law. For the reasons why this is so it is only necessary to refer to the explanation given in the decision

of the House of Lords in *Sinclair* v. *Brougham*. (1) In another view, the executor had become a trustee in British Honduras of the surplus of the estate. In either aspect the case comes within the enactment above referred to, and the Court below ought to have given effect to this view.

Their Lordships consider that they have no alternative to humbly advising His Majesty that this order appealed from should be discharged, and that it should be referred to the Court below to give leave to issue a writ for service out of the jurisdiction. The respondent must pay to the appellant the costs of this appeal and of the application on which the order appealed from was made.

Solicitors for appellant: *Vincent & Vincent.*
Solicitors for respondent: *Norris, Allens & Co.*

[PRIVY COUNCIL.]

YAMIKE KWEKU . . . . . APPELLANT;

AND

ANNOR ADJAYE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE GOLD COAST COLONY.

Gold Coast—Arbitration—Order failing to fix Time for making Award—Power to set aside Award—Filing Award in Court—Award to have effect of Judgment—Absence of Right of Appeal—Supreme Court Ordinance (No. 4 of 1876, Gold Coast), Order LII., *rr.* 3, 12 (*c*), 13, 14.

The Supreme Court Ordinance, 1876, of the Gold Coast, provides by Order LII., r. 3, that a reference by the Court to arbitrators shall fix the time for delivery of the award; by r. 12 (*c*), that if an objection to the legality of an award is apparent on its face, the Court may remit it for reconsideration; by r. 13, that an award shall not be liable to be set aside except on the ground of perverseness or misconduct of the arbitrators; by r. 14, that if no application shall have been made to set aside or remit an award, or if the Court has refused an application

(1) [1914] A. C. 398.

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for that purpose, either party may file the award in Court, and that it shall thereupon have the same force and effect as a judgment: —

Held, following *Nusserwanjee Pestonjee* v. *Meer Mynoodeen* (1855) 6 Moo. I. A. 134, that an award which recited an order of reference not fixing a time for delivery of the award was prima facie liable to be set aside, but that rr. 12 (*c*) and 13 of the Ordinance prevented the omission from having that effect; further, that where, an application to set aside having been made and dismissed, an award had been filed in Court, r. 14 did not make it a judgment so as to give a right of appeal.

Judgment of the Supreme Court of the Gold Coast affirmed.

APPEAL (No. 122 of 1924) from a judgment of the Full Court of the Supreme Court of the Gold Coast Colony (March 20, 1923) dismissing an appeal from an award of an arbitrator.

By an order of a Divisional Court in the Gold Coast Colony the matters in dispute in a suit were referred under Order LII. of the Supreme Court Ordinance to an agreed arbitrator, but the time for the delivery of the award was not fixed by the order.

The arbitrator delivered his award on June 21, 1919; the award recited the order under which it was made. On September 29, 1919, a motion to modify, correct, or set aside the award was dismissed by a Divisional Court; an appeal from the order was dismissed by the Full Court. On April 24, 1922, the present respondent (who had been substituted for the original party, Kwesie Horbah) filed the award in Court. Subsequently the appellant appealed to the Full Court against the award, but the appeal was dismissed upon the ground that the Court had no jurisdiction, as there was no appealable judgment.

The material provisions of the Ordinance appear from the judgment of the Judicial Committee.

1926. June 3. *Narasimham* and *P. V. Subba Rao* for the appellant.

Montgomery K.C. and *T. B. Ramsay* for the respondent.

June 21. The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment dated March 20, 1923, of the Full Court of the Supreme

Court of the Gold Coast Colony, dismissing an appeal from an award of an arbitrator, dated June 21, 1919, and filed in the Supreme Court on April 24, 1922.

The appellant is the Chief of Sinibu in Western Appolonia and the respondent is the Omanhin or King of Beyin, who is the paramount Chief in Western Appolonia. On August 19, 1912, the appellant issued a writ of summons against the predecessor of the respondent, in the Supreme Court of the Gold Coast Colony (as subsequently amended by order of Court, dated December 2, 1916), by which he claimed to "establish his title to the Kobina-Sua and Akah lands situate in Appolonia, bounded with the defendant by the Ailaim stream with Kofie Enima by Bissaw stream, and for perpetual injunction restraining the defendant, his agents, nominees, assignees, and people from interfering with the plaintiff as to receipts of rents of concessions granted by the plaintiff within the aforesaid area or otherwise interfering with the plaintiff in his enjoyment of the said lands."

On August 9, 1916, Watson J., sitting in the Divisional Court, made the following order in this cause: "Under Order LII., r. 1, of the Supreme Court Ordinance I make this order of reference and by consent of parties I hereby appoint Mr. John Maxwell, Provincial Commissioner, Western Province, to be arbitrator in this case, and I give parties leave to submit in writing any matters or former judgments or orders which parties desire to bring to the notice of the arbitrator.

"Parties agree to sign the following document agreed upon by counsel on their behalf:—

"We, the undersigned parties in this action, on behalf of ourselves, our elders and subjects, hereby agree that the matter in dispute between us in this case (writ of summons No. 91/1912) be submitted to the arbitration of John Maxwell, Esq., Provincial Commissioner, Western Province.

"We further agree that the decision of the said arbitrator shall be final and conclusive as between us subject to the provisions of Order LII., of the Supreme Court Ordinance, No. 4 of 1876, and that the arbitrator shall have full powers to invite the co-operation of any natives of the colony as assessors or

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otherwise as he may deem fit, and that the question of the costs of this arbitration shall follow the event.

"We further agree to abide by any orders or direction made by the arbitrator consequent upon this arbitration."

Subsequently, certain amendments (immaterial for the purpose of this appeal) made were by the order of the Court in the writ of summons.

It is to be observed that though this order provides that the decision of the arbitrator shall be subject to the provisions to Order LII. of the Supreme Court Ordinance No. 4 of 1876, it does not, as is required by r. 3 of that order, fix the time for the delivery by the arbitrator of his award. That rule runs thus: "The Court shall, by an order under its seal, refer to the arbitrators the matters in difference in the suit which they may be required to determine and shall fix such time as it may think reasonable for the delivery of the award, and the time so fixed shall be specified in the Order."

If one turns to the award, one finds that it begins with a recital of the order of reference setting out that that order was made under Order LII. of the Supreme Court Ordinance, No. 4 of 1876, and then proceeds to recite the fact that the parties have agreed that the decision of the arbitrator shall be final and conclusive as between them (i.e., the parties themselves) subject to the provisions of Order LII. of the Supreme Court Ordinance No. 4 of 1876. This obviously means subject to all the provisions of Order LII. applicable to the case, amongst which r. 3 must be included, because the fixing of the time for the delivery of the award is not a mere trivial provision regulating procedure; it is a matter of vital importance designed to prevent the decision of the matters in controversy between the parties being indefinitely postponed.

The effect of the omission of any specification of the time for the making of the award under a legislative provision somewhat similar to r. 3 of Order LII. has been considered and decided in the case of *Nusserwanjee Pestonjee* v. *Meer Mynoodeen*. (1)

(1) 6 Moo. I. A. 134.

There the applicable legislative provision was the Bombay Reg. VII. of 1827. By cl. 1 of its third section it was enacted, amongst other things, that the deed of reference "must contain the time within which the award is to be given," and it was held that as the deed of submission contained no provision as to when the award was to be made by the arbitrators, it was bad and unenforceable.

It appears to their Lordships that the omission from the recited order made under Order LII. of the above mentioned Ordinance of any indication of the time when it is to be made is such a defect, apparent upon the face of the award, as would prima facie make it bad and liable upon proper proceedings being taken to be set aside. But r. 12 (*c*) of this same Order LII. protects the award from being so dealt with. It provides that if an objection to the legality of the award is apparent upon its face the Court can remit it for reconsideration by the arbitrator or umpire upon such terms as it may think proper, and then by r. 13 enacts, as complementary to the preceding rule, that an award shall not be liable to be set aside except on the ground of perverseness or misconduct of the arbitrators. The effect of these two rules necessarily is, in their Lordships' view, that an award cannot be set aside merely for an illegality appearing on the face of it, where that illegality does not amount to perverseness or to misconduct of the arbitrator.

Rule 14 then provides that if no application shall have been made to set aside the award or to remit it or any of the matters referred for reconsideration, or if the Court shall have refused any such application, either party may file the award in Court, and the award shall thereupon have the same force and effect as a judgment. Those provisions obviously mean that the award cannot be filed unless no application to remit it or to set it aside shall have been made, or if made shall have failed. If its legality has not been attacked, or if that attack has been made and failed, the award ceases to be assailable, and may by either party be filed and enforced.

The contention put forward by Mr. Narasimham on behalf

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of the appellant is wholly in conflict with such a construction of Order LII. According to him, though the award has successfully run the gauntlet of the provision of the Order, the filing of it is a new point of departure, the objections to its validity already dealt with may be renewed, because it is provided that when filed it shall have the same force and effect for all purposes as a judgment, and a judgment can always be appealed from. In their Lordships' view that contention on behalf of the appellant is unsound, because r. 14 does not enact that the award is or becomes a judgment. The nature of the award is not changed. It is still an award, but after running the gauntlet it is, if filed, given the force and effect for all purposes of a judgment.

The learned counsel frankly admitted that if the arguments submitted by him were held to be unsound his appeal must fail. It appears to their Lordships that this frank admission is perfectly accurate. The judgment appealed from is that of March 20, 1923, of the Supreme Court of the Gold Coast Colony, and it is quite clear from that judgment that the appeal to that Court was based on the contention that the use of the word "judgment" in r. 14 necessarily gave to a party to the submission or award the right of appeal. The learned judge who delivered the judgment of the Court, in the penultimate passage of his judgment, said: "Were it otherwise, it would be possible for a party to move to set aside an award, and to continue appealing through the various Courts, and then, if still unsuccessful, as soon as the other side had filed the award to start the same process all over again on the same subject-matter."

In their Lordships' opinion the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellant: *A. L. Bryden.*
Solicitors for respondent: *Ashurst, Morris, Crisp & Co.*

[PRIVY COUNCIL.]

FIRM OF R. M. K. R. M. . . . . APPELLANTS; J. C.* 1926 July 5.

AND

FIRM OF M. R. M. V. L. . . . . RESPONDENTS.

(AND CONNECTED APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS.

Straits Settlements (Penang)—Principal and Agent—Res judicata—Moneylending Firm—Firm designated by Letters—Judgment against Agent with Firm Letters prefixed—Bar to Suit against Firm—Jurisdiction to set aside Judgment.

A judgment in Penang against a defendant, described in the writ by the group of letters under which a moneylending firm there carries on business followed by the name of the firm's local representative, is a judgment against the local representative personally, whether he is a partner in, or merely an agent for, the firm. A subsequent suit for the same debt against the firm itself is barred. The Court (including the Appellate Court) has no jurisdiction on motion to set aside the earlier judgment on the ground that the plaintiff was ignorant of its effect in law.

Judgment of the Supreme Court of the Straits Settlements reversed.

APPEAL (No. 76 of 1925) from a judgment of the Supreme Court of the Straits Settlements, Appellate Jurisdiction (September 24, 1924), affirming a judgment of Sproule J. of that Court.

The main question for determination in the present appeal was whether in a suit (1923 No. 550) brought by the respondent firm M. R. M. V. L. against the appellant firm R. M. K. R. M. the plaintiff firm was precluded from recovering judgment by reason of a judgment previously recovered in suit 1923, No. 120, brought by the respondents in the connected appeal—namely, M. R. M. V. L. Supramanian Chetty — against the appellant in that appeal — namely, R. M. K. R. M. Somasundaram Chetty. A question involved was whether the judgment in the earlier suit had been rightly set aside.

* *Present:* VISCOUNT HALDANE, LORD ATKINSON, and LORD DARLING.

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The facts are fully stated in the judgment of their Lordships.

In the Supreme Court suit No. 550 had been consolidated with a summons in suit No. 120 to set aside the judgment obtained therein.

Sproule J., who tried the consolidated suit, set aside the judgment in suit 120, and in suit 550 entered judgment for the firm M. R. M. V. L. against the firm R. M. K. R. M.

On appeal the judgment of Sproule J. was affirmed. The learned judges (Shaw C.J., Whitley and Barrett-Lennard JJ.) were of opinion that the judgment in suit 1923, No. 120, was a judgment against Somasundaram Chetty personally, but that in the circumstances of the case it could be set aside, at any rate by the Appellate Court, and that on the merits of the case the defendant firm had no defence to suit No. 550.

1926. June 7, 8. *Jowitt K.C.* and *Wilfrid Lewis* for the appellants. The judgment in suit No. 120 was a bar to the right of action of the plaintiff firm in suit No. 550 ; the cause of action was merged in the former judgment : *Kendall* v. *Hamilton* (1) ; *Moore* v. *Flanagan* (2) ; *Parr* v. *Snell.* (3) The rule which bars the suit could not be evaded, even if the first judgment was set aside by consent : *Hammond* v. *Schofield* (4) ; *Cross* v. *Matthews.* (5) The judgment in suit No. 120 should not have been set aside ; there was no jurisdiction to set it aside by summons in the suit. The Supreme Court acted on the view that the first judgment was one which could not be properly obtained, but that was not so, as Somasundaram Chetty was liable as a principal, though he was not one : *Kavena* v. *R. M. S. M. Komarappa Chitty.* (6)

Cave K.C. and *Hildesley* for the respondents. It was found as a fact in suit No. 550 that the transaction giving rise to the debt was between the firms, and that apart from the technical defence raised there was no defence to it. The

(1) (1879) 4 App. Cas. 504.
(2) [1920] 1 K. B. 919.
(3) [1923] 1 K. B. 1.
(4) [1891] 1 Q. B. 453.
(5) (1904) 91 L. T. 500.
(6) (1909) 11 Str. Settlements L. R. 70.

judgment in suit No. 120 was not obtained by the firm, but by M. R. M. V. L. Supramanian Chetty; it was a judgment erroneously obtained by him personally. There was, therefore, no need to set it aside. In any case the Appellate Court had jurisdiction to set aside the judgment as having been given per incuriam, and as not being in accordance with the intention of the parties.

July 5. The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment of the Supreme Court of the Straits Settlements, Appellate Jurisdiction, dated September 22, 1924, dismissing the appeal of the defendants in two consolidated suits against the judgment of a judge of that Court dated May 26, 1924.

The principal questions in this appeal are whether the respondents (the plaintiffs in the consolidated suits) are precluded from recovering judgment in the second suit (namely, suit 1923, No. 550) by reason of the judgment recovered by them in the first suit (namely, suit 1923, No. 120), and whether there was jurisdiction in the consolidated suits to set aside the judgment in the first suit (namely, suit 1923, No. 120).

The appellants and the respondents are moneylenders carrying on business in Penang; the respondents (plaintiffs) under the vellasam or mark of M. R. M. V. L. and the appellants (defendants) under that of R. M. K. R. M. The defendant firm is owned by one Ramasamy Chetty, of Palavangudi, Ramnad District, Southern India. It is the practice for such firms to carry on their business through an attorney and agent and to describe and style the firm by its vellasam or mark coupled with the name of its Penang agent for the time being. Supramanian Chetty was at all material times the attorney and agent of the plaintiff firm and A. N. S. Somasundaram Chetty the attorney and agent of the defendant firm.

The relation in which these attorneys or agents, when engaged in a moneylending business, stood to their principals, whether the latter were individuals or firms, their functions

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and powers, are well and authoritatively described by Barrett-Lennard J. in his judgment delivered in this case in the Court of Appeal on September 22, 1924. He said: "First, when a local representative of a Chetty firm carries on the business under the vellasam (i.e., the letters) of the firm coupled with his own distinct name, the announcement to the external world in general is that, whether a co-partner with, or a mere agent of, other persons, he is to be looked upon as a principal. It is to be noted that the vellasam of a firm is not its full style. Next, a local representative of the type described does not label himself as simply an agent. He regularly sues as a principal on mortgage, deeds, bills of sale and promissory notes. The title of his co-partners or principals to immovables granted in form to him is never abstracted or otherwise shown on the occasion of any sale or qualified disposition. The rights of his principals or co-partners are in truth behind the curtain, much to the disadvantage of the Government."

Mr. Jowitt contended, in the clear and forcible argument he addressed to the Board on behalf of the appellants, that in reality in the moneylending business in Penang, the vellasam of a firm coupled with the name of a local representative, whether in fact partner, attorney or agent, was merely meant to inform the public that this named person was then conducting the business of the local branch of the firm.

On February 27, 1923, a writ of summons was issued in a cause (suit 1923, No. 120) at the suit of M. R. M. V. L. Supramanian Chetty against R. M. K. R. M. Somasundaram Chetty, claiming a sum of $7400 described as "balance principal of current account," and "interest from August 28, 1922, to February 27, 1923, at $1·25 per $100 per mensem as per Chetty's current account." The writ was served personally on Somasundaram Chetty, who on March 14, 1923, entered an appearance in person, not by solicitor, running thus: "Enter appearance for R. M. K. R. M. Somasundaram Chetty.....Signed R. M. K. R. M. Somasundaram Chetty, defendant."

On March 19, 1923, a summons was taken out by the solicitor for the plaintiff, addressed to R. M. K. R. M. Somasundaram Chetty, on an application, under s. 208 of the Code of Civil Procedure, for leave to sign judgment. That application was supported by the affidavit of M. R. M. V. L. Supramanian Chetty, and then R. M. K. R. M. Somasundaram Chetty, by his solicitor, took out a summons for further particulars of the plaintiff's claim. This summons was supported by the affidavit of the defendant, in which he denied being indebted to the plaintiff in the sum claimed. On March 28, 1923, an order was made by the registrar, that the plaintiff was at liberty to sign judgment against the defendant for the sum of $7400 with costs, and that the defendant was at liberty to defend as to the balance. The defendant never did defend as to the balance, possibly because he was superseded in his office, but the result apparently was that in suit No. 120 judgment was signed for the original capital sum of $7400. The person who was the principal of the business of which Somasundaram was the attorney was named Ramasamy Chetty, R. M. K. R. M. being his firm.

On April 10, 1923, M. R. M. V. L. Supramanian Chetty commenced proceedings in bankruptcy, founded on the judgment of March 28, 1923, for $7400 and costs, by issuing a notice directed against Ramasamy Chetty and his firm R. M. K. R. M., but entitled as against R. M. K. R. M. Somasundaram Chetty, and by a bankruptcy petition dated May 15, 1923, sought to get a receiving order and an order of adjudication against Ramasamy Chetty. There could be no more effectual way of treating the judgment in suit No. 120 as a valid judgment than thus making it the basis of bankruptcy proceedings. On June 18, 1923, Sproule J. set aside this bankruptcy notice on the ground that the service of it was defective. The plaintiff entered an appeal against this order, but did not prosecute the objection. The plaintiff in the original suit No. 120 then issued a fresh bankruptcy notice against R. M. K. R. M. Somasundaram Chetty, but had it directed against Ramasamy and his firm, and

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obtained an order for substitution of service of the notice on Ramasamy's attorney in Penang. The application was one to set aside this bankruptcy notice on the ground (inter alia) that the judgment of March 28, 1923—namely, suit No. 120 —upon which the bankruptcy notice was based, was a judgment against Somasundaram Chetty, and not against the firm R. M. K. R. M. or its sole proprietor, Ramasamy Chetty. On July 13, 1923, by an order of that date, Sproule J. dismissed this application. On appeal the Court of Appeal allowed the appeal, reversed the order of Sproule J., set aside the order allowing substituted service of the bankruptcy notice, and declared that Ramasamy Chetty had not committed any act of bankruptcy. The importance of these bankruptcy proceedings lies in this, that the foundation on which they were based is the judgment signed in suit No. 120 for the capital sum of $7400, and the persistent effort of the plaintiff in that suit has been to enforce that judgment as a valid and binding legal adjudication. There could be no more emphatic way of asserting its validity.

On September 5, 1923, an action was commenced by a specially indorsed writ of summons in suit No. 550, by the firm M. R. M. V. L. against the firm R. M. K. R. M., claiming to recover not only the principal sum of $7400, for which a judgment had been already recovered in suit No. 120, but interest calculated at $1·25 per $100 per mensem, amounting in the whole to $8376·40. Ramasamy, who carries on business at Penang under the mark R. M. K. R. M., entered an appearance, and required a statement of claim to be delivered to him. A summons was, on September 17, 1923, taken out by the plaintiff firm under s. 208 of the Civil Procedure Code, on an application on the part of the plaintiff, calling on the defendant firm to show cause why final judgment should not be entered against them for the amount indorsed on the writ. This summons was supported by an affidavit made by Supramanian Chetty, describing himself as attorney of the plaintiff firm who proved the debt claimed, and was opposed on an affidavit of one S. S. Supramanian

Chetty, who described himself as the attorney of R. M. K. R. M. Ramasamy Chetty. The deponent denied that the defendant firm was indebted to the plaintiff in the sum of $8376·40, or any part thereof, and then added the following statement: "I am informed and verily believe that in suit 1923 No. 120 the said M. R. M. V. L. Supramanian Chetty, the attorney of the plaintiffs abovenamed, sued the said R. M. K. R. M. Somasundram Chetty in person claiming a sum of $7400 (besides interest thereon) as the balance of principal due from him on current account and on March 28, 1923, recovered a judgment for the said sum of $7400 and costs personally against R. M. K. R. M. Somasundram Chetty and that proceedings to enforce the said judgment were issued against the said R. M. K. R. M. Somasundram Chetty. In this action, the plaintiffs claim the same amount of $7400 (besides interest thereon) as balance of principal due to them on the same current account and seek to recover another judgment on the same claim against the defendant firm. I am advised and verily believe that the defendants have a good defence to this action."

By summons dated September 17, 1923, the plaintiffs applied for judgment in the suit 1923, No. 550. Upon the hearing of the summons the registrar gave leave to defend. The plaintiffs appealed to the judge against the order giving leave to defend, and on October 1, 1923, issued a summons in suit No. 120 for an order that the judgment in that suit be set aside on the ground, as stated in the summons, "That it has been held by the Court of Appeal" (in the bankruptcy proceedings) "to be judgment against Somasundram Chetty personally which the plaintiff never asked for and on which there was no adjudication."

On October 5, 1923, a summons was taken out by the plaintiff's solicitor (who was also the solicitor of A. N. S. Somasundaram Chetty, who had been the attorney of the defendant firm in Penang until May, 1923, when his power of attorney was cancelled) on an application for the consolidation of suit No. 120 and suit No. 550. The application was adjourned into Court for argument, and came on for hearing

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on October 8, 1923, before Sproule J., who granted the application. But strange as it may appear, while these proceedings for the consolidation of the two suits were taking place, the earlier proceedings were also taking place; first, an application by the plaintiff in suit No. 120 to set aside the judgment signed in that suit, and, second, an appeal by the plaintiff in suit No. 550 from an order of the registrar made on September 24, 1923, granting the defendant liberty to defend. The questions involved were fully argued on three occasions, and it was ultimately ordered that the summons and appeal should stand for judgment, and, on October 12, 1923, it was ordered that the appeal should be dismissed and be dealt with on the trial of the consolidated actions, and that the costs be reserved to the trial. So that not only is the impeached judgment made the basis of active bankruptcy proceedings, but its existence is prolonged until the termination of the consolidated actions, and its validity is to be in that suit determined.

Legal judgments cannot be treated as mere counters in the game of litigation; moreover, when once pronounced, they cannot be lightly set aside.

It may perhaps be (there is no proof of it) that the parties to suit No. 120 were under the impression that the result of suing and being sued in the names of the respective attorneys of their respective firms (their principals) would be the same as if the firms themselves were the parties litigant, but that is not the kind of error, if it be an error, which vitiates a judgment regularly pronounced. Certainly it does not appear that this error existed when one sees the judgment.

The statement of claim in the consolidated suit was delivered on November 16, 1923, and the defence of Ramasamy Chetty was delivered on December 6, 1923. The first is a very long document; but the following facts are not really in controversy: First, the causes of action in suits No. 120 and No. 550 are the same—a debt of $7400 owed to the same firm, a balance on current account (the fact that interest was claimed in the latter suit cannot alter matters). Second,

that the judgment in suit No. 120 only bound Somasundaram, the attorney of the firm R. M. K. R. M., personally. Paras. Nos. 26 to 31 inclusive of the statement of claim contain apparently the only comments which, it is alleged, tend to show that the plaintiff, in instituting the suit, was mistaken, or misled, or fell into error.

It is stated that the people in Penang knew well the meaning of "R. M. K. R. M. Somasundaram Chetty" and knew that all transactions effected in his name were transactions with, and were binding on, the firm, and were not personal transactions of the attorney. This is precisely what the Chief Justice has held is not the position. It is then averred that Ramasamy Chetty held out A. N. S. Somasundaram Chetty as his authorized agent and attorney to do business on behalf of his firm, and that Ramasamy authorized his attorney to open the accounts which resulted in the debt sued for. In the statement of claim it is averred that R. M. K. R. M. Ramasamy Chetty and A. N. S. Somasundaram Chetty were not joint contractors, nor was the latter a partner in the firm R. M. K. R. M., and the judgment signed sub nomine R. M. K. R. M. Somasundaram Chetty was not a bar to judgment being given against R. M. K. R. M. Ramasamy Chetty; that the judgment dated March 28, 1923—namely, the judgment in suit No. 120—was bad and void in law, and should be set aside; that this judgment was not and was never intended to be signed against A. N. S. Somasundaram Chetty personally, or against any one except the firm R. M. K. R. M.; that A. N. S. Somasundaram Chetty is a person, but R. M. K. R. M. is merely a trading name and has no personal existence at all; that A. N. S. Somasundaram Chetty is a person and was not sued as a defendant in that suit, and he is not bound by it. Most of these averments are flatly contradicted by the documents in the case. Somasundaram Chetty was sued in the case as "R. M. K. R. M. Somasundaram Chetty," which on the admitted facts means that this latter person was attorney or agent or partner of the firm indicated by the letters R. M. K. R. M. That is abundantly proved.

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The two judgments which were signed in suits No. 120 and No. 550 were both based on the same cause of action, one directed against the agent of a firm and the other against the firm itself, and cannot in law co-exist in valid and effective force. In *Kendall* v. *Hamilton* (1) the Lord Chancellor (Earl Cairns) stated with fullness and characteristic accuracy the law upon this point. He said: "Now, I take it to be clear that, where an agent contracts in his own name for an undisclosed principal, the person with whom he contracts may sue the agent, or he may sue the principal, but if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even although the judgment does not result in satisfaction of the debt. If any authority for this proposition is needed, the case of *Priestly* v. *Fernie* (2) may be mentioned."

The reasons why this must be the case are, their Lordships think, obvious. It would be clearly contrary to every principle if a creditor who has seen and known and dealt with and given credit to the agent should be driven to sue the principal if he does not wish to sue him; on the other hand, it would be equally contrary to justice that the creditor, on discovering the principal who really has had the benefit of the loan, should be prevented from suing him if he wished to do so. But it would be no less contrary to justice that the creditor should be able to sue first the agent and then the principal, when there was no contract and no intention of any of the parties that he should do so. Again, if an action were brought and judgment recovered against the agent, then the agent would have a right of action for indemnity against his principal, while if the principal was liable also to be sued he would be vexed with a double action. Further, if actions could be brought and judgments recovered against the agent and afterwards against the principal, there would be two judgments in existence for the same debt or cause of action. They might not necessarily be for the same amounts, and there might be recoveries had or liens and charges created

(1) 4 App. Cas. 504, 514. (2) (1865) 3 H. & C. 977.

by means of both, and there would be no record on the face of the judgments, or any means short of a fresh proceeding, of showing that the two judgments were really for the same debt or cause of action, and that satisfaction of one was or would be satisfaction of both.

It may possibly be, but it is not proved in evidence, that the plaintiff in suit No. 120 was under the impression that he could obtain a judgment for $7400 against the defendant, the attorney, agent or partner of or in the firm of R. M. K. R. M., which would not merely be a personal judgment against the attorney or agent, but a judgment against the defendant attorney's firm. If the plaintiff attorney was under that impression it was wholly due to his ignorance of the law, and it is because he instituted and prosecuted to judgment suit No. 120 in that state of ignorance that he or his principal now claims to have this judgment set aside. No fraud was practised upon the plaintiff in that suit, or his principal; no false representation was made to them; no inducement held out to the agent to sue in the way he did; and no misleading steps were taken or acts done with the consent of the defendant attorney or his principal.

It is, of course, open to the plaintiffs, both attorney and principal, to bring an action to have the judgment entered up in suit No. 120 set aside. They do not take that course; they apparently want to have it set aside by motion. It is not necessary to cite on this point any authorities in addition to *Ainsworth* v. *Wilding*. (1) Romer J., in giving judgment in that case, said: "The Court has no jurisdiction, after the judgment at the trial has been passed and entered, to rehear the case. . . . . Formerly the Court of Chancery had power to rehear cases which had been tried before it even after the decree had been entered; but that is not so since the Judicature Acts. So far as I am aware, the only cases in which the Court can interfere after the passing and entering of the judgment are these: (1.) where there has been an accidental slip in the judgment as drawn up—in which case the Court

(1) [1896] 1 Ch. 673, 676.

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has power to rectify it under Order XXVIII., r. 2; (2.) when the Court itself finds the judgment as drawn up does not correctly state what the Court actually decided and intended." He points out that he is not dealing with cases where the Court acts with the consent of the parties. Reference may be made also to *In re Swire.* (1)

The weakness of the respondent's case appears to their Lordships to consist mainly in this, that there is no evidence whatever that Supramanian Chetty was under any mistake or misconception whatever in instituting suit No. 120, as to the form in which it was instituted, neither was there any evidence that the two attorneys believed that their two principals were by their description made parties litigant to the suit.

Their Lordships are therefore of opinion that the order appealed from was erroneous and should be set aside, and that judgment should be entered for the appellants with costs here and below, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Rawle, Johnstone & Co.*
Solicitors for respondents: *R. W. Cooper & Sons.*

(1) (1885) 30 Ch. D. 239.

[PRIVY COUNCIL.]

CHRISTIAN AND OTHERS . . . . . APPELLANTS; J. C.*

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TAYLOR AND ANOTHER . . . . . RESPONDENTS. July 6.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

Will—Construction—Gift to Widow for Life—Gifts to Children in Remainder—Gift over to Survivors on Death without Issue—Period of Distribution—Defeasibility restricted to Widow's Lifetime.

A testator bequeathed personalty to his wife absolutely, and gave her the residue of his estate during her lifetime; he appointed no trustee, but made his wife executrix. The will gave specified lands to his several children, expressly providing that these dispositions were to take effect only after the death of the widow; the will continued as follows: "in the event of any or either of my said children dying without lawful issue his or their share or shares shall be divided among the survivor or survivors":—

Held, that reading the will as a whole the above gift over to surviving children was not to be construed as referring to death at any time (which was the prima facie meaning), but to death before the period of distribution, which was the death of the widow, she being in effect a trustee with a discretion to distribute. The introduction of the words "or their" in the clause had significance only upon that construction.

O'Mahoney v. *Burdett* (1874) L. R. 7 H. L. 388 distinguished.

In re Roberts [1916] 2 Ch. 42 and *In re Brailsford* [1916] 2 Ch. 536 approved.

Judgment of the Supreme Court of Newfoundland affirmed.

APPEAL from a judgment of the Supreme Court of Newfoundland (March 2, 1925).

The first respondent, as administrator, with the will annexed, of William Brazel, deceased, petitioned the Supreme Court praying for directions as to the true construction of the will. The question raised was whether certain gifts over on "dying without lawful issue" referred to death at any time, or to death during the lifetime of the testator's widow, the tenant for life.

* *Present:* VISCOUNT HALDANE, LORD SHAW, LORD WRENBURY, LORD DARLING, and LORD SALVESEN.

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The terms of the will and the relevant facts appear from the judgment of the Judicial Committee.

Horwood C.J. and Johnson J. (Kent J. dissenting) held that the provision of the will referred to death at any time.

1926. May 11, 12. *Warwick Draper* and *Brian Dunfield* for the appellants.

Bischoff for the respondent, Margaret Brazel.

H. A. Hind for the respondent Taylor, the administrator.

July 6. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. This is an appeal from a judgment of the Supreme Court of Newfoundland on an application by the respondent Taylor as the administrator, with the will annexed, of the estate of one William Brazel for directions as to the construction of his will. The will was dated February 17, 1896, and the testator died on April 21, 1897. He left a considerable estate, consisting mainly of land, some of it with houses on it, in Newfoundland. Part of this land is said to have been freehold and the rest leasehold.

After bequeathing to his wife Margaret his chattels and money and securities absolutely, the testator made a disposition of his remaining property in the terms which were as follows: "All the rest residue and remainder of my estate I will devise and bequeath unto my said beloved wife Margaret for her sole use and benefit during her lifetime, and after her death all that part of my estate situate on Barron Street, formerly Casey's Lane, and upon which the houses and tenements held or occupied respectively by"—the names of the tenants were here stated—"now stand together with all the land appurtenant thereto or connected with the said tenancies I give devise and bequeath to my three sons Patrick, William and David for their absolute use and benefit, share and share alike. And that part of my estate situate on the West side of Brazel's Square"—described as above by reference to the names of the tenants, together with other land similarly specified—"I give devise and bequeath to my four sons Patrick, William, David and Thomas for their absolute use and

benefit share and share alike. After my wife's death also that part of my estate situate on New Gower Street "—described also by reference to the tenants—" I give devise and bequeath to my daughter Alice wife of Charles Taylor for her sole separate and absolute use and benefit and free from the control of her present or any future husband. After my wife's death also that part of my estate situate on New Gower Street "—described in the same manner—" I give devise and bequeath to my daughters Catherine and Margaret for their absolute use and benefit and free from the control of any husband or husbands they or either of them may marry, share and share alike. After my wife's death also that part of my estate situate on New Gower Street "—described in the same manner—" I give devise and bequeath to my daughter Catherine for her sole separate and absolute use and benefit and free from the control of any husband she may marry. After my wife's death also that part of my estate situate on New Gower Street "—described in the same manner —" I give devise and bequeath to my daughter Margaret for her sole separate and absolute use and free from the control of any husband she may marry. After my wife's death also that part of my estate situate on Pleasant Street upon which stand the houses and tenements "—similarly described—" I give devise and bequeath to my son Thomas for his sole separate and absolute use and benefit. After my wife's death also my farm known as the 'Old Farm' situate on the Mundy's Pond Road and the field known as 'Bentlans Field,' and the farm known as the 'New Farm' with the barn thereon situate on the said Mundy's Pond Road I give devise and bequeath to my seven children share and share alike. The dwelling houses and land situate on Pleasant Street in the occupancy of . . . . I give devise and bequeath to my son Thomas for his sole separate and absolute use and benefit. I give devise and bequeath also to my said son Thomas the dwelling house now occupied by me in Brazel's Square and the outhouse and land in connection therewith but upon the express condition that it is to be a home for any of my said children whilst unmarried, and any of my

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said children whilst unmarried shall have the right to occupy the said house and premises jointly with my said son Thomas. My farm situate on the Topsail Road near Brazel's Pond I give devise and bequeath to my four sons Patrick, William, David and Thomas share and share alike. I give devise and bequeath that part of my estate situate at the head of Brazel's Square and on the east side thereof upon which the house occupied by Susannah McDonald now stands and the land appurtenant thereto or connected therewith to my grandchild Olive Mary Taylor absolutely. The bequests in this my last will to my children and my grandchild shall take effect only after the death of my beloved wife. In the event of any or either of my said children dying without lawful issue his her or their share or shares shall be divided equally among the survivors or survivor. I appoint my said beloved wife Margaret executrix of this my last will. Dated at St. John's, Newfoundland, this seventeenth day of February, Anno Domini, One thousand eight hundred and ninety-six. W. Brazel, Signed published and declared by the said testator as and for his last will and testament in presence of us who in his presence at his request and in presence of each other have subscribed our names as witnesses thereto. The words 'In the event of any or either of my said children dying without lawful issue his her or their share or shares shall be divided equally among the survivors or survivor' having been interlined between the second and third and fourth lines from the top of this sheet. Allan Knight, Edward Shea."

The main question to be decided is, whether the gift over towards the end of the will on the death of any of the testator's children dying without lawful issue is to be read as referring to death at any time or to death before any period of distribution, if there be one.

The testator left seven children; four sons, Patrick, William, David and Thomas; and three daughters, Alice, Catherine and the respondent Margaret. He also left a granddaughter, Olive Mary Taylor, as to whose share no question arises.

The widow died on June 17, 1897. All the seven children survived her. One—namely, the respondent, Margaret Brazel—is now the sole survivor. Five died leaving no issue. One, Alice, died leaving her surviving two daughters, the appellants, Olive Christian and Gladys O'Leary.

The summons for directions came before the Supreme Court, and judgment was delivered on March 2, 1925. The majority of the judges (Horwood C.J. and Johnson J.) held (Kent J. dissenting) that the respondent, Margaret Brazel, was entitled to all the landed property of the testator excepting the portions given by the will to his daughter Alice and his granddaughter Olive Christian.

Whether the conclusion so arrived at was right depends on the expressions used in the will read as a whole. The question is one entirely of intention. In ascertaining that intention, their Lordships have to bear in mind that the words " dying without lawful issue " are, prima facie, to be construed in their literal significance as referring to death at any time, and not merely in the lifetime of the tenant for life. This rule of interpretation will yield to any sufficient indication to a contrary effect, to be found in the language of the will taken as a whole, but apart from any such indication death at any time is what the words taken by themselves must be assumed to mean. At one period a different view was supposed to have been established bv the fourth of the rules of construction laid down by the then Master of the Rolls, Lord Romilly, in *Edwards* v. *Edwards*. (1) That fourth rule was treated as laying down that words indicating death without leaving issue must be construed as referring to the occurring of such death only in the lifetime of the tenant for life, where there was one, that being treated as equivalent to a period of distribution. But it was pointed out by two decisions of great authority, given in the House of Lords: *O'Mahoney* v. *Burdett* (2) and *Ingram* v. *Soutten* (3), that the expression " period of distribution " as popularly used is an ambiguous and equivocal expression. It may import either a mere apportionment of

(1) (1852) 15 Beav. 357. (2) L. R. 7 H. L. 388.
(3) (1874) L. R. 7 H. L. 408.

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interests under the will, as, for instance, by the mere provision of a life interest followed by the gift to the person whose subsequent interest is to govern in the case of death without leaving issue. Alternatively, it may assume the form of a direction to divide and hand over the estate on the termination of an antecedent life interest. Unless there was such a direction, the House of Lords held that the rule as laid down by Lord Romilly could not be maintained if meant to be a rule of construction to be applied without regard to expressions in the will requiring it. If the language used showed that the one person to whom the gift was made was intended in some event to take and enjoy an absolute possessory interest, and if that intention could not receive effect unless the operation of the divesting clause was limited to a time earlier than his death, then the time within which the divesting clause is to operate must be restricted. But unless there is in the context of the will something that independently requires it, the law must be taken to be that words indicating a gift over on death without issue are not to be construed as restricted to death in the lifetime of the tenant for life.

The principle thus established by the decisions in the House of Lords is a valuable guide in all questions of construction to which it can be applied, and it gets rid of Lord Romilly's supposed fourth rule. But, as was stated in the House of Lords, it has to yield to distinct indications of a contrary intention in the particular will under construction. These indications may be of different kinds. In *In re Roberts* (1) and also in *In re Brailsford* (2), Sargant J. reviewed the authorities, and held that where, although the expression "divide" "or distribute" was not used, there could be found an expression of intention to apportion finally the estate on the determination of the life interest, the gift over was limited to death before that determination. In reviewing the authorities in *O'Mahoney* v. *Burdett* (3) Lord Cairns points to *Da Costa* v. *Keir* (4) and *Home* v. *Pillans* (5) as illustrations of

(1) [1916] 2 Ch. 42.
(2) [1916] 2 Ch. 536.
(3) L. R. 7 H. L. 388.
(4) (1827) 3 Russ. 360.
(5) (1833) 2 My. & K. 15.

cases in which the wills there under consideration contained particular expressions requiring the exclusion of the principle that death meant death at any time. Obviously there can be no exhaustive enumeration of cases of this class.

The question which their Lordships have to decide is whether the language of the will before them is inconsistent with the application of the prima facie general principle in interpretation. Their Lordships are of opinion that it is inconsistent.

The initial bequest is one of personalty, and it is made to the wife for her "sole separate and absolute use." All the residue of the testator's estate he gives to her "for her sole use and benefit during her lifetime." He appoints no trustees, but makes her his executrix. She was, therefore, a trustee during her lifetime. After her death, as to a certain block of his land, he devises and bequeaths it to three named sons "for their absolute use and benefit, share and share alike." They thus took as from his death vested interests in remainder expectant on the determination of the wife's life estate. He makes exactly the same disposition of other blocks of his land in favour of his other sons and children respectively and a granddaughter. In each case the disposition is to take effect only after the death of his wife, and this he reiterates in a clause expressly so providing, after these dispositions have been enumerated. This is immediately followed by the words which have given rise to the controversy: "In the event of any or either of my said children dying without lawful issue, his her or their share or shares shall be divided equally among the survivors or survivor."

Their Lordships think that, although there is no express introduction of trustees, with a direction to distribute, there is what is equivalent to it for the purpose of the question before them. After the death of the tenant for life, the gifts are in each case to be of the full legal and equitable estates for the absolute use and benefit of the beneficiaries, without any qualification in terms. This appears to indicate an intention that the dispositions are to be treated as exhaustive at the death of the tenant for life. Moreover, unless they are so treated and the gifts over are to be operative only on

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death within her lifetime, it is not apparent that any significance can be found for the introduction of the word " their " share or shares in addition to " his " or " her " in the gift over at the end of the will. For to satisfy the word " their " there must be a plurality of shares as to which the gift over is to take effect at the same moment of time. This may well be the case if several children have died in the lifetime of the widow, but cannot subsequently happen unless two or more children die at the same moment. It is at this moment of time that the survivors are to be ascertained. If the word so introduced is not confined in its operation to the lifetime of the widow when the gifts in fee take effect, but is to be operative at any time, there is no moment of time at which the survivors are to be ascertained. The expression fits only, as pointed out by Kent J., if it be confined to death without lawful issue prior to the period which is that of the gift becoming gifts in absolute property. In that case the words indicate that the clause is to operate distributively. This is the conclusion to which their Lordships have come on reading the will as a whole, a conclusion which in their opinion is in no way inconsistent with the view taken by the House of Lords in the two cases referred to. It follows that the clause of accruer, being so limited, and all the children having survived the tenant for life, no question arises as to whether the accruer can extend to further interests which only in a different view might have been acquired under it.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, and that, in accordance with the conclusion arrived at by Kent J., it should be declared that the children took indefeasible interests on the death of the testator's wife. The costs of all parties as between party and party, excepting in the case of the trustee, who should have his solicitor and client costs, ought, they think, to be paid out of the estate.

Solicitor for appellants : *W. L. Toplis.*
Solicitors for respondents : *Parkers & Hammond.*

[PRIVY COUNCIL.]

GORDON GRANT AND COMPANY, LIMITED . . . . . } APPELLANTS;

AND

F. L. BOOS . . . . . RESPONDENT.

J. C.* 1926 July 6.

ON APPEAL FROM THE WEST INDIAN COURT OF APPEAL.

Mortgage—Personal Covenant—Judicial Sale—Mortgagee purchasing with Leave of Court—Right of Mortgagee to sue for Deficiency.

A mortgagee who has obtained an order for sale, and, bidding with the leave of the Court, has purchased the mortgaged property, is not precluded from suing the mortgagor upon his personal covenant in the mortgage for the difference between the sum due under the mortgage and that realized by the sale. It is not material that he has resold the property at a profit.

Judgment of the West Indian Court of Appeal reversed.

APPEAL (No. 89 of 1925) from a judgment of the West Indian Court of Appeal (May 2, 1925) affirming a judgment of the Supreme Court of Trinidad and Tobago.

In 1922 the appellants, in an action against the respondent to enforce a mortgage of estates in Trinidad, obtained by consent an order for accounts and for a sale of the mortgaged property in default of payment. The respondent having failed to pay the sum found due, the property was sold by auction. The appellants, having obtained leave to bid, purchased. They subsequently sold the property at a much larger price. The mortgage contained a personal covenant, but no personal judgment had been taken.

In 1923 the appellants sued the respondent in New York, where he then resided, to recover on the personal covenant the sum found due on the mortgage less the sum realized.

The respondent thereupon brought the present action, claiming a declaration that his right to redeem the mortgaged property was revived and reopened, and for an injunction.

* *Present:* LORD ATKINSON, LORD PHILLIMORE, and LORD MERRIVALE.

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The West Indian Court of Appeal (Fisher C.J., Trinidad, and Major C.J., British Guiana; Walton C.J., Grenada) affirmed the judgment of Clark J. restraining the appellants from further prosecuting any action against the respondent, either in or out of the colony, to recover any money found due to them in the action above referred to. An appeal by the respondent against the judge's refusal to make the declaration prayed for was dismissed.

1926. June 11. *Clauson K.C.* and *Underhill* for the appellants. No doubt a mortgagee who has obtained a judgment for foreclosure absolute cannot sue upon the personal covenant without reopening the foreclosure: *Perry* v. *Barker* (1); *Lockhart* v. *Hardy* (2); *Palmer* v. *Hendrie.* (3) Where, however, the mortgagee has brought the property to a judicial sale, he can sue on the personal covenant for any difference between the sum due and the amount realized: *Perry* v. *Barker* (4); *Rudge* v. *Richens* (5); *Ellis & Co.'s Trustee* v. *Dixon-Johnson.* (6) That is clearly implied, though not expressly stated, in *In re Barker's Claim* (7) and *Worthington & Co.* v. *Abbott.* (8) It is submitted that the fact that the mortgagees, bidding with the leave of the Court, have purchased, and resold, does not affect their rights.

The respondent did not appear.

July 6. The judgment of their Lordships was delivered by

LORD PHILLIMORE. The appellant company held a deed of further charge dated May 4, 1921, whereby the respondent charged certain estates in the island of Trinidad for securing several sums of money due from him to the appellant company. This deed also contained a personal covenant by the defendant to pay the sums due. There had been previous transactions between the parties, and encumbrances on the estates had been already created, all which were covered by this deed

(1) (1803) 8 Ves. 527; (1806) 13 Ves. 198.
(2) (1846) 9 Beav. 349.
(3) (1859) 27 Beav. 349; (1860) 28 Beav. 341.
(4) 13 Ves. 198, 205.
(5) (1873) L. R. 8 C. P. 358.
(6) [1925] A. C. 489.
(7) [1894] 3 Ch. 290.
(8) [1910] 1 Ch. 588.

of further charge. The debts not having been paid, the appellant company brought an action in the Supreme Court of Trinidad and Tobago to enforce their security by sale of the mortgaged property, and the appellant company also claimed against the respondent on his personal covenant to pay.

The action came on for trial on March 27, 1922, when it was ordered by consent of parties that accounts should be taken and a day fixed for payment of the sum due, and that in default of the respondent or one Mackenzie who was a puisne encumbrancer redeeming the property, it should be sold by the Court, and the proceeds applied towards satisfying the appellant company's claim. The appellant company was given leave to bid at the auction.

On the accounts being taken, it was found that there was due to the appellant company the sum of $565388·95 and, as neither the respondent nor Mackenzie redeemed the property, it was put up for sale in the usual manner according to the practice of the Court in two lots. Apparently however there was no bidder other than the appellant company, who bought the two lots for the total sum of 350*l.*, subject to a prior mortgage for 50,000*l.*, and the properties were in due course conveyed to the appellant company by deed executed by the registrar of the Court.

On February 19, 1923, the appellant company agreed to sell the estates to another company called the Sainte Madeleine Sugar Co., Ld., at a great increase of price.

Although when the action was launched there had been a claim on the respondent's personal covenant to pay the debt, no personal judgment appears to have been taken against him. But on October 17, 1923, the appellant company brought an action in the Supreme Court of the State of New York against the respondent, who was then residing in New York, for the recovery of the balance found due from him less the sum realized by the judicial sale.

Thereupon he began the present action, claiming that his right to redeem the mortgaged property had been revived and reopened by this suit, and that he should be at liberty

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to redeem accordingly, and that inquiries should be made and accounts taken for this purpose. In the alternative, he claimed an injunction restraining the appellant company from proceeding with its action in the New York Court. As a third alternative he claimed damages.

This, the present action, came on for trial before Clark J. He decided that it was too late for the respondent to seek to redeem the property, but that he might have an injunction staying the action against him on the personal covenant. In so deciding, he followed what he considered to be a precedent—namely, a decision in the same Court by Swan J. in the case of *Sampson* v. *Thompson*. (1)

The appellant company appealed to the West Indian Court of Appeal; but the majority of the Court, consisting of the Chief Justice of Trinidad and the Chief Justice of British Guiana, decided against him, the Chief Justice of Grenada dissenting. Hence the present appeal.

It is unfortunate that the respondent has not instructed counsel to appear in support of the judgments which have been rendered in his favour: and their Lordships have therefore had the task of scrutinizing the arguments against his case with special care. But they have had the advantage of perusing the reasoned judgments in his favour which have been rendered in the Courts of the West Indies; and the authorities on the subject have been brought to their notice by counsel for the appellant company in a very careful and candid argument, while the subject-matter of the appeal is one which has been treated of in the text-books.

As a general rule the mortgagee is entitled to pursue all the remedies which are given to him by his contract. He can recover upon the personal covenant of his debtor and he can enforce his charge upon the mortgaged property. But care has to be taken that he is not overpaid.

If he has recovered part of his debt in a personal action, he can only enforce his charge upon the mortgaged property in respect of the balance remaining due. This being so, if he reverses the process and starts by enforcing his claim against

(1) (1906) 1 Trinidad Local Reports, 194.

the property and procures a decree of foreclosure, which bars his debtor from redeeming the property and makes it the mortgagee's own, and then seeks to enforce his personal remedy against the debtor, the debtor can say that any money which he pays under the personal judgment relieves pro tanto the mortgaged property, and that he is entitled to have the foreclosure decree set aside and to have another chance of redeeming his property on paying only the balance —if any—which is left over and above what he has paid under the judgment.

If, however, the mortgagee has in the interval sold the estate, so that he cannot offer it for redemption and the mortgagor has no chance to redeem, some other course must be taken to prevent the mortgagor from having to pay twice over. It might be possible to put a value upon the foreclosed property and to allow the mortgagee to sue the debtor for the balance—if any—and no more. Or the course might be taken of simply stopping the mortgagee from suing, on the assumption that he must be held to have taken the property, which cannot now be valued, as the complete satisfaction of his debt.

There was for some time some doubt which of these two courses should be pursued in practice. In *Perry* v. *Barker* (1) in 1803, when the property had been foreclosed and sold, and an action was then brought on the personal covenant, Eldon L.C., while granting on an interlocutory application an injunction to restrain the action at law, referred to the doubt which had been expressed by his predecessor Lord Thurlow as to which was the proper course.

In 1806 when the case came to a final hearing (2) before Lord Eldon's successor, Lord Erskine, he stated his doubts upon the subject and that he had conferred with that great master of equity, Lord Redesdale, Lord Chancellor of Ireland; but he came finally to the conclusion that if a mortgagee has parted with the foreclosed property, he must be restrained by a perpetual injunction from suing upon the covenant.

The matter, however, was not apparently deemed to be

(1) 8 Ves. 527. (2) 13 Ves. 198.

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settled by this decision, because in *Lockhart* v. *Hardy* (1) the then Master of the Rolls treated the matter as one of some doubt. In that case, the mortgagee had sold the property fairly and had by the sale realized less than the debt. However, in the long run, the judge came to the same conclusion and held that the estate of the deceased mortgagor was not liable.

But, if the mortgagee does not use the remedy of foreclosure but sells under a power of sale given to him by the mortgage deed and brings into account the whole sum thus received and then proceeds to sue his debtor for the balance and the balance only, there is no question of double payment, and there would seem to be no reason in principle why he should not recover the balance.

When he has foreclosed the estate, no one can tell what it is really worth; and it is for this reason that he is precluded from suing at law, because it cannot be ascertained that there is any residue due to him. The estate which he has taken under his foreclosure may be equal in value to or even greater in value than his debt. But when he sells, if he receives more than his debt, he pays the balance to the mortgagor; if he has just received the value of his debt, he cries quits. Why, then, should he not, if he has received less than the value of his debt, pursue his other remedies for the balance?

This conclusion, which seems sound, is stated by Fisher in his Law of Mortgages (section 1969) and by Halsbury in the Laws of England (vol. 21, pp. 271 and 308), and is supported by the authority of the case of *Rudge* v. *Richens* (2) and must be taken to be established.

Now, if instead of the mortgagee exercising a power of sale given to him in the deed, he, when he brings an action to enforce his security, asks the Court for a sale instead of a foreclosure, why should not the same principle apply? The sale ascertains the value of the property, the mortgagee gets no more from the property than what the sale brings to him. If the property realizes more than what is due to him, the mortgagor gets the balance. If the property realizes less,

(1) 9 Beav. 349.

(2) L. R. 8 C. P. 358.

the mortgagee is pro tanto unpaid and should be allowed to sue on the personal covenant.

In this connection it is interesting to note that when in the case of *Perry* v. *Barker* (1) Lord Erskine said that he had consulted Lord Redesdale, he added that he was told that the practice in Ireland was to grant a decree for sale instead of a decree for foreclosure, and that if the sale produced more than the debt, the surplus went to the mortgagor, but if less the mortgagee had the remedy of an action for the difference. This seems consonant to reason.

It may be that the general practice in Trinidad is to grant a decree for sale instead of a decree for foreclosure. But whether this be so or not as a rule, in the present case the decree for sale was made by consent. No doubt the sale realized very little, and the mortgagee, who had leave to bid, apparently bought a valuable property for a small sum; and their Lordships can understand that the Courts in the West Indies may have felt some aversion to granting the mortgagee further advantages. But it was a judicial sale which is not impeached, and the mortgagor, who could have made a bid or procured a bid, must take the consequences.

It is fair to Clark J. to say that the West Indian case on which he relied, though not precisely in point, does show that the view which Clark J. took of the law, was one which Swan J. would have taken. But for the reasons which have been given, their Lordships are of opinion that it was unsound, and they will humbly recommend His Majesty that this appeal should be allowed, and that the action should be dismissed with costs both here and in the Courts below.

Solicitors for appellants: *J. N. Mason & Co.*

(1) 13 Ves. 198, 205.

Distinguished. *Re* MULHOLLAND'S WILL TRUSTS. [1949] 1 All E.R. 460.

[PRIVY COUNCIL.]

J. C.* 1926 July 12.

WRIGHT . . . . . APPELLANT;

AND

MORGAN AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Trust—Trustee buying Trust Property—Will giving Trustee Option to purchase—Assignment of Option to another Trustee—Invalidity—Trustees' Right to sell unauthorized Investment—Trustee buying Farm Stock from Trust—Accountability.

The owner of two estates in New Zealand, known as Surrey Hills and Windermere, provided by his will that they should be offered at valuations, made as therein directed, to the testator's son H. H. W., who was one of the trustees under the will. After the death of the testator, H. H. W. sold and conveyed his rights under the will, including his right to purchase the estates, to D. W., another son of the testator, also one of the trustees. In 1907 the trustees sold Surrey Hills at a valuation, made as provided, to D. W., as being entitled to exercise the option. In 1908 Windermere, including land known as Chapman's Block, which had been bought by the trustees without authority, was similarly sold to D. W. The farming stock on each estate was separately valued and included in the sale, though not referred to in the will. At the date of sale of Windermere D. W. had ceased to be a trustee, but he had arranged the sale before retiring from the trust. In 1922 an action was brought to set aside the sales to D. W., for an account of profits and payment to the trust:—

Held, that the sales must be set aside, as the trustees could not sell to one of themselves without a conflict of duty and interest arising. But that an inquiry ordered as to profits should not include Chapman's Block, as the trustees could dispose of it in the absence of a unanimous adoption of the investment by the beneficiaries, and the original purchase money had been refunded to the trust. Further, that the defendant was not liable to account for his profits from dealings with the stock, the sale to him not being of a business but of individual sheep and cattle.

Judgment of the Court of Appeal of New Zealand varied.

APPEAL (No. 46 of 1926) from a judgment of the Court of Appeal of New Zealand (August 1, 1925) varying a judgment of the Supreme Court.

* *Present:* VISCOUNT DUNEDIN, LORD ATKINSON, LORD PHILLIMORE, LORD CARSON, and LORD MERRIVALE.

The action was brought by the tenant for life and infant reversioners under the will of E. G. Wright, deceased, to set aside purchases of parts of the residue, purporting to have been made in the years 1907 and 1908 by the defendant Douglas George Wright, who was a trustee under the will, and for an account of profits with payment to the trust.

The facts are fully stated in the judgment of the Judicial Committee.

The trial judge (Reed J.) held that the purchases, save of the stock, were valid. On appeal the Court of Appeal (Sim, Herdman, MacGregor, and Alpers JJ.; Stout C.J. dissenting), held that all the purchases by the appellant were invalid. The terms of the orders made appear from the present judgment. The judgments of the Courts in New Zealand are reported at [1925] N. Z. L. R. 689.

1926. June 10, 11. *M. J. Gresson* and *Andrewes Uthwatt* for the appellant. The option to purchase given by the will to Harry was an assignable interest in the land: *Morland* v. *Hales* (1); *Vyse* v. *Foster*. (2) The option could be assigned to Douglas, although he was a trustee; as the purchase price was to be ascertained by valuation there was no conflict of duty. Further, the exercise of the option was under the control of the Court: *Earl of Radnor* v. *Shafto*. (3) As Chapman's Block was originally purchased in breach of the trust, the trustees were entitled to deal with it, all the beneficiaries not being sui juris so as to elect to take it over themselves: *In re Jenkins & Randall's Contract* (4); *In re Patten* (5); Lewin on Trusts, 12th ed., p. 556. Trustees for sale can leave part of the agreed price on mortgage, equally the agreement was valid by which the trustees remained in possession of part of the land sold under the option, Douglas entering into an agreement for completion at a later date: *Quill* v. *Hall*. (6) As regards the claim as to the stock, the respondents are entitled only to the inquiry ordered by the

(1) (1910) 30 N. Z. L. R. 201.
(2) (1874) L. R. 7 H. L. 318.
(3) (1805) 11 Ves. 448.
(4) [1903] 2 Ch. 362.
(5) (1883) 52 L. J. (Ch.) 787.
(6) (1908) 27 N. Z. L. R. 545.

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trial judge. It was not possible to arrive at the profits; the order to take an account on that basis was impracticable and oppressive.

Myers K.C. and *Stamp* for the respondents. If the option given by the will to Harry was assignable at all, it could not be assigned effectively to the appellant. He was precluded from purchasing by the strict rule of equity, that a trustee for sale may not purchase the estate: *Parker* v. *McKenna* (1); *Williams* v. *Scott* (2); *Delves* v. *Gray*. (3)

[LORD DUNEDIN referred to *Aberdeen Ry. Co.* v. *Blaikie Brothers* (4), citing *York Buildings Co.* v. *Mackenzie*. (5)]

Though the appellant formally retired from being a trustee, it was rightly held that he continued to be one de facto: *Ex parte Lacey* (6); *In re Boles and British Land Co.'s Contract*. (7) The appellant had a conflict of duty, as he had to decide as trustee when the property should be offered under the option, and what terms of payment should be accepted. The terms of the option were not strictly complied with: *Edwards* v. *Edwards*. (8) The appellant was liable to account for the profit arising from Chapman's Block, assuming that he was entitled to take it over: *In re Patten*. (9) The purported sale to the appellant did not take the property out of the trust estate. An inquiry as to the profits arising from the stock was properly ordered: *In re Norrington* (10); *Walker* v. *Woodward*. (11)

Gresson replied.

July 12. The judgment of their Lordships was delivered by

VISCOUNT DUNEDIN. Though the full story out of which the present appeal arises is a complicated one, it is possible to set forth the facts on which the appeal really depends at no undue length.

E. G. Wright died on August 12, 1902. He was the owner

(1) (1874) L. R. 10 Ch. 96.
(2) [1900] A. C. 499.
(3) [1902] 2 Ch. 606.
(4) (1854) 1 Macq. 461, 474.
(5) (1795) 3 Pat. 378.
(6) (1802) 6 Ves. 625.
(7) [1902] 1 Ch. 244.
(8) (1837) 1 Jur. 654.
(9) 52 L. J. (Ch.) 787, 789.
(10) (1879) 13 Ch. D. 654.
(11) (1826) 1 Russ. 107.

of (inter alia) two landed estates known as Surrey Hills and Windermere in the County of Ashburton, New Zealand. He left a will dated February 28, 1889, whereby he appointed as trustees and executors his wife, who survived him, and his eldest son Harry Herbert Wright.

After certain specific bequests, which need not be particularized, he left the residue of his estate, which included the above mentioned landed estates and the stock upon them, to his trustees in trust. The purposes of the trust were to convert and sell the whole residue and divide it into eight shares, which eight shares were to be conveyed as follows: two shares to Harry Herbert; one share to his wife; one share to Edward Fondi a son; one share to Douglas a son, and three shares to three daughters, but the daughters' shares not to be paid, but to be put in settlement for each daughter for life, and for her children in remainder. The trustees were empowered, if they thought fit, to delay the sale of any parts of the property for seven years.

The will also contained the following clause, on which much of the dispute in the present action turns: ". . . . Provided always that my said trustees shall not sell my freehold estate in the County of Ashburton or any part thereof until the same shall have been offered by my said wife if she shall then be living and if dead by my said son Edward Fondi Wright in writing under her or his hand to my said son Harry Herbert Wright at a valuation to be made by two valuers named by my said wife or the said Edward Fondi Wright as the case may be or if such valuers shall disagree then to be made by a third valuer to be named by the other two before they shall enter upon the valuation as their umpire nor until my said son Harry Herbert Wright shall have refused or omitted to notify in writing under his hand to my said wife or my said son Edward Fondi Wright as the case may be his acceptance of the offer within three months after the making thereof but no purchaser under this my will shall be obliged to take notice of this direction. . . . ."

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By a codicil dated May 25, 1894, he appointed his son Douglas as an additional trustee, and directed that the name of Douglas should be substituted in the above mentioned proviso for the name of Edward Fondi. He also empowered his trustees to carry on the farming carried on by him on his estates. The trustees entered into possession and managed the estate, the practical management of the real estate being done by Douglas, who was a practical farmer. The estates were not put up for sale.

On February 10, 1905, Douglas acquired the share of Harry Herbert. The agreement to purchase contained a conveyance, not only of the share as such—i.e., one-fourth of the residue—but also contained the following words: "Together with the right to purchase the testator's freehold estate in the County of Ashburton at a valuation conferred upon the said Harry Herbert Wright by the said will and all other benefits and advantages given to him by the said will as a legatee of whatsoever kind or description at the price of 13,325*l.*"

On the same day he also acquired the interest of Edward Fondi, and in May, 1907, he acquired the interest of his mother. Thus at May, 1907, he was in right of five-eighths of the residue, the other three-eighths being the shares to be held in settlement of the daughters.

In 1905 Harry Herbert had resigned his trusteeship, and Nosworthy, who had married one of the three daughters, had been appointed trustee. In December, 1906, and the beginning of January, 1907, the trustees determined to sell Surrey Hills. Mrs. Wright then offered the estate to Douglas, as in right of the option to buy conferred by the will on Harry Herbert. Douglas accepted, and valuers were appointed. There is controversy as to the formality of the offer and acceptance, but this in the view taken by their Lordships becomes immaterial and need not be inquired into. The valuers valued the stock. Their valuation, dated January, 1907, was as follows: Land 56,301*l.* 11*s.*, stock 11,496*l.* 9*s.*; total 66,800*l.*

The transaction was completed as follows :—

	£	s.	d.
There were outstanding mortgages to A. M. P., Ld., amounting to	33,000	0	0
Douglas was entitled to five-eighths of the capital	18,937	10	0
Cash paid by Douglas	362	10	0
	£52,300	0	0

This left a sum of 14,500*l.* due from the appellant Douglas.

To meet this position transfers of part only of the estate were given, and the remainder, comprising 2863 acres, which had been valued at 15,073*l.* 16*s.*, remained in the trustees' names, being held by the appellant Douglas on the terms of an agreement for sale, which provided for completion on June 30, 1909, and for payment of interest at 5 per cent. per annum on the unpaid purchase money. By March, 1909, the appellant Douglas had repaid to the trustees 4500*l.*, leaving a balance of 10,000*l.* due. This sum was paid by the appellant Douglas in March, 1920.

In April, 1907, Douglas resigned his trusteeship, but he had already arranged with his co-trustee that a sale should also be made of Windermere. A like offer was made of Windermere to him and accepted by him. Valuers were appointed, and Windermere was valued as follows :—

Windermere (including Chapman's Block) was valued at 4527*l.* for Chapman's Block, and the rest of the property at 17,444*l.*, making a total of 21,971*l.* (which was taken as 22,000*l.*), and the stock was valued at 4000*l.*, making in all 26,000*l.*

No transfer of the land was taken, and the appellant Douglas held the property under an agreement for sale, which provided for completion on May 12, 1913, and for payment of interest at 5 per cent. per annum on the unpaid purchase money.

The transaction was completed as follows :—	£
Mortgage to A. M. P. Society	8000
Deposit	800
Leaving a balance outstanding of	17,200
Total	£26,000

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This balance of 17,200*l.* was provided for as follows :—

The mortgage of 8000*l.* was paid off by the appellant Douglas on July 1, 1921, and 1200*l.* repaid to the trustees, leaving the appellant Douglas's liability at 16,000*l.*, of which he owned five-eighths. The balance of three-eighths is represented by 6000*l.*, which the appellant still owes the trustees in respect of Windermere, and which is secured by portions of Windermere valued at 10,145*l.*, still held by the trustees in their own names.

The security is found to be ample. All members of the family, including the three daughters, were cognizant of these transactions.

One other matter of fact requires to be explained. There was a piece of land known as Chapman's Block above mentioned, which lay conveniently to Windermere. This was purchased by the trustees in 1905, and merged in Windermere. The purchase of real property was not authorized by the will. Since the date of the various transactions the whole of the properties have gradually risen in value.

In 1924 the present action was raised by Mrs. Morgan, one of the three daughters of the testator, and her infant children, by their guardian. It asked that it should be declared that the various sales to Douglas should be set aside, and accounts taken of the profits made, so that these might be restored to the trust estate. The trial judge, after inquiry, pronounced an interim judgment, by which he held that the option to purchase the landed property given by the will to Harry Herbert was assignable, and was duly assigned to Douglas. Consequently, the sale of the landed properties to Douglas was good, and could not be set aside, but as regards the stock he held that, as it was not covered by the option, the sale of it by the trustees to Douglas, who himself was a trustee, was bad, and he ordered inquiry to be made. His order was : " (6.) Inquiries shall be made and accounts shall be taken by the registrar of this Court and an accountant to be appointed by the registrar—(1.) As to the price paid for the live and dead stock the property of the trust estate, purchased by Douglas George Wright from the trustees ;

whether the price so paid was fair and reasonable, and if not by how much it was underpaid. (2.) As to the rate of interest paid by Douglas George Wright in respect of trust moneys from time to time owing by him to the trust or sub-trust from and including the year 1908 to and including the year 1924, and as to the current rate of interest payable in respect of loans of similar nature during the same period, and as to whether, and if so to what amount, interest was underpaid during such period. As to the securities now held by the trustees in respect of the sub-trust, and as to whether the same are in order, and as to whether they are good and sufficient securities with a margin not less than that required by the Trustee Act, 1908, and if not which securities are inadequate and to what extent."

Appeal being taken to the Court of Appeal, that Court held that the option to Harry Herbert was not assignable to another trustee to the effect of enabling that trustee to buy the trust estate. They therefore set aside the sales and made the following order: "(1.) That the defendant Douglas George Wright was not entitled to purchase either Surrey Hills or Windermere (including Chapman's Block), and he is liable to account for the purchase money received by him from the sales made by him of parts of these estates, and he holds the balance of these estates upon the trusts of the will of the testator. (2.) All accounts and inquiries necessary to afford relief on this basis shall be taken and made in accordance with directions to be given hereafter. And it is further ordered that these directions be given by the Supreme Court on the application of the plaintiff, and it is further ordered that the appellants are entitled, in lieu of the first inquiry directed by para. 6 of the said judgment, to an inquiry as to the profits made by Douglas George Wright in his dealings with the live and dead stock on Surrey Hills and Windermere. And it is further ordered that the respondent, Douglas George Wright, pay the costs of this appeal on the highest scale as on a case from a distance."

From this judgment appeal has been taken, after leave allowed, to His Majesty in Council. The leading question

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accordingly is whether the option to purchase given by the will to Harry Herbert was assignable and assigned to Douglas to the effect of making him entitled to purchase the trust estate, he himself being a trustee. Technically speaking, he was not a trustee at the time of the purchase of Windermere, but their Lordships have no hesitation in holding with the Court of Appeal that although he had actually resigned, the whole scheme had been arranged by him prior to his resignation, and that in law he must be treated as being a trustee at the time of the will.

Speaking generally, any vested interest is assignable unless there is something in the nature of the interest, or something in the words of the settlement which creates the interest which contradicts the nature of assignability. Their Lordships do not doubt that Harry Herbert's option might have been assigned to a third person. There is nothing in the nature of the interest itself which points to non-assignability, nor are there any words in the will which would seem to forbid assignation. When, however, it is found that the assignation is in favour of the person who is himself a trustee, quite another question arises. The appellant argued that this right to purchase was property in the person of Harry Herbert, who was a cestui que trust, and that it is well settled that a trustee may purchase the interest of a cestui que trust. In one sense of the word "property" it is true that this option was the property of Harry Herbert, but the quality of the property was not like the property of land or of a chattel. It was only a right to enter into a contract. If the option had been exercised by Harry Herbert himself, and the property bought, then Harry Herbert might have transferred to a trustee just as well as to any one else. The object of the sale would, in that case, have been no longer trust property. So also if the option had been transferred to a stranger, the resulting contract which would have been its sequel would have been between the trustees and, to use a colloquial expression, an outsider. But as it was, the option transferred to Douglas only gave Douglas a right to ask from the trustees a contract of sale, and that contract

of sale was ex rei necessitate, a contract between the trustees and himself as a trustee, and that is what the law will not allow. It would be profitless to quote the many cases which have arisen to illustrate the doctrine. They may all be referred to the same root idea, that equity will not allow a person, who is in a position of trust, to carry out a transaction where there is a conflict between his duty and his interest. Accordingly, the real test to be applied to the circumstances is, assuming that Harry Herbert's option was validly assigned, so far as power to assign was concerned, to Douglas, did a conflict of duty and interest arise which would prevent Douglas from entering into a binding contract with the trustees ? It was argued that no such conflict would arise, because by the terms of the will, which was the wish of the testator, the whole conditions of sale are regulated ; valuers are to be appointed, and their decision to be accepted as to the price to be payable. There was no possibility of the higgling of the market between vendor and purchaser. Nevertheless, a conflict of duty and interest may arise, although there is no direct association between the two parties as vendor and purchaser. Probably no better illustration could be found than in the old case of the *York Buildings Co.* v. *Mackenzie* (1) in the House of Lords. It was a Scotch case, but the Scotch law is the same as the English in the matter, and was especially so stated to be in the subsequent case of *Aberdeen Ry. Co.* v. *Blaikie Brothers.* (2) In the former case the person who had bought, and whose purchase was set aside after eleven years of possession, was what is called the common agent. The case occurred in an old form of process for the realization of the landed estates of a debtor called a ranking and sale. The common agent was appointed by the Court to look after and carry into effect the sale. He arranged the date of the sale, fixed the upset price, and answered questions to inquirers, but the actual sale was not conducted by him. It was by public auction, and termed a judicial sale. The common agent Mackenzie bought at the judicial sale. It was not averred that the price was inadequate,

(1) 3 Pat. 378. (2) 1 Macq. 461.

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but, although it was after eleven years, the House of Lords, reversing the judgment of the Court of Session, held that his position of common agent was a position of trust, and that his duty and interest so conflicted as to make it impossible that he should be a purchaser of the property at the sale. Now, applying the principles of that case to the present, their Lordships hold that the position of Douglas as a trustee and as the assignee of the option to purchase was one which would involve a conflict of duty and interest. It was of moment when the sale should take place, because the option could only be exercised when the trustees had decided that now was the moment to sell. The best moment for the trust was the moment when prices generally were high. The best moment for a purchaser was when prices generally were low, and such prices would be naturally reflected in the value fixed by the valuers. So also as to the terms of payment, the best term for the trust was cash down ; the best term for the purchaser was some easier arrangement. Their Lordships do not think it necessary to go into the actual terms of payment here, although it is perhaps startling to find that the whole transaction was carried out by the payment in cash of quite an infinitesimal sum. The criterion, however, is not what was done, but what might be done. Their Lordships, therefore, come to the conclusion that this case falls within the general rule, and that the sale being, as carried out, a sale of trust property to a trustee, cannot be allowed to stand, as in a question with infant beneficiaries who cannot be affected as the daughter might have been affected, by the lapse of time since the transaction was effected to her knowledge but not to theirs.

So far, therefore, their Lordships agree with the result reached by the Court of Appeal. Two subsidiary questions, however, arise. The first point is as to Chapman's Block. This is not dealt with as a separate question by the Court of Appeal. They seem to have thought that it was enough to say that it had practically been treated as part of Windermere. Their Lordships think, however, that this is not so. This is not a case of improper employment by the trustees of trust

funds for the purposes of their own business and speculation. It is the case of an improper investment. Now, if a trustee has made an improper investment, the law is well settled. The cestuis que trustent as a whole have a right, if they chose, to adopt the investment and to hold it as trust property. But if there is not unanimity then it is not trust property, but the trustee who has made it must keep the investment himself. He is debtor to the trust for the money which has been applied in its purchase: *Parker* v. *McKenna*. (1) Now, it is admitted that there has been no unanimity on the beneficiaries' part to consider Chapman's Block as trust property. Further, it is admitted that the money used in the purchase of Chapman's Block has been refunded to the trust. The result is that the inquiry directed by the Court of Appeal must exclude inquiry as to Chapman's Block.

Finally, there is the question of stock. Now, if the stock could be looked on as a business, e.g., if the trustees had bought a public house with the funds of the trust, the direction of the Court of Appeal would be right, but in the view of their Lordships that is not so. The stock is not a business. There is no identity between the stock as it now exists and the stock as it was bought from the trustees. The sale was not of a business; the sale was only of individual sheep and cattle. Consequently, their Lordships think that in this matter the direction of the trial judge was right. It is proper to notice that though interest has been paid to the cestuis que trustent, yet if the sum which might be found under the remit of Reed J. was greater, the natural result would be that compound interest would have to be charged; but inasmuch as the sum due on interest would fall to be applied to the life interest of the daughters, and as Mrs. Morgan was fully aware of what was done, their Lordships do not think that compound interest should be charged, and, therefore, that the direction of Reed J. was right.

Their Lordships will humbly advise His Majesty that the judgment of the Court of Appeal should, in the main, be affirmed, but subject, as has been said, to the exclusion of

(1) L. R. 10 Ch. 96.

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Chapman's Block in the inquiries directed by that Court. The judgment must also be varied by setting aside so much of it as reversed the judgment of Reed J. as to the stock. The case should, therefore, be remitted to the Supreme Court in order that the inquiries directed may be proceeded with on the basis of this judgment.

The respondents will have two-thirds of the costs of the appeal. The costs in the Courts below will remain as dealt with by the Court of Appeal so far as past costs are concerned, but the Supreme Court will deal with the costs of the inquiries directed after the result of those inquiries has been arrived at.

Solicitors for appellant : *Coward, Chance & Co.*
Solicitors for respondents : *Blyth, Dutton, Hartley & Blyth.*

END OF VOL. AND OF APPELLATE SERIES FOR 1926.

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Decision of the Court of Appeal [1925] 1 K. B. 372 affirmed. HARTLAND *v.* DIGGINES - - - - **H. L. (E.) 289**

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Decision of the Court of Appeal [1925] 1 K. B. 421 affirmed. BRITISH INSULATED AND HELSBY CABLES, LD. *v.* ATHERTON **H. L. (E.) 205**

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Judgment of the Supreme Court of British Honduras reversed. BOWLING *v.* COX **J. C. 751**

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2. —— *Charterparty — Demurrage — Principal and Agent—Signature by Agent "for" named Charters — Printed Form — Written Clause that Demurrage should be paid by named Agent — Personal Liability of Agent.*

Decision of the First Division of the Court of Session in Scotland reversed. KIMBER COAL CO., LD. *v.* STONE AND ROLFE, LD. **H. L. (Sc.) 414**

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3. —— *Charterparty — Purchase of Ship with Notice of Charterparty—Purchaser refusing to perform Charterparty—Charterers' Right to an Injunction.*

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